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SUPREME COURT, U.S.
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No.

In the

Supreme Court of the United States

LATRIESTE RESTAURANT & CABARET, INC.,
d.b.a. THE DIAMOND CLUB,

Petitioner,

vs.

VILLAGE OF PORT CHESTER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where local authorities revive and use a dormant zoning time restriction to harass and discourage the presentation of constitutionally-protected expressive conduct, does the Equal Protection Clause of the Fourteenth Amendment require that a selective enforcement claimant prove that the local authorities knew that violations of the zoning restriction had occurred in the past and that the officials intentionally did not enforce the restriction?

2. Whether, in the circumstances of this harassment case, the cabaret presenting topless dancing is "the prevailing party" and thus entitled to a "reasonable attorney's fee" within the meaning of 42 U.S.C. § 1988(b).

PARTIES TO THE SECOND CIRCUIT PROCEEDINGS

In the proceedings before the Second Circuit, LaTrieste Restaurant & Cabaret, Inc., d.b.a. The Diamond Club, and The Diamond Club were named as Plaintiffs-Appellees, and Cross-Appellants. Before this Court, LaTrieste Restaurant & Cabaret, Inc., d.b.a. The Diamond Club, is the sole Petitioner.

Before the Second Circuit, the Village of Port Chester, John Branca, Anthony Fontana, John Belfatto and Carl Verrastro were named as Defendants-Appellants and Cross-Appellants. Before this Court they are Respondents.

The Second Circuit's caption also named Domenick Tamarro, James Savage, Christine Korff, Michael Antaki, Thomas Ceruzzi, Janusz Richards, Zoning Board of the Village of Port Chester, and George O'Hanlon as "Defendants." But since they were not named as Defendants-Appellants or Cross-Appellants before the Second Circuit, they need not be deemed Respondents before this Court. Presumably their interests are fully represented by the named Respondents before this Court.

RULE 29.6 STATEMENT

The Petitioner LaTrieste Restaurant & Cabaret, Inc., is a New York corporation, doing business as The Diamond Club. It has no parent or nonwholly owned subsidiaries to list pursuant to Rule 29.6.

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The Petitioner respectfully requests that a writ of certiorari issue to review the judgment and decision rendered by the United States Court of Appeals for the Second Circuit in this case on August 11, 1999.

OPINIONS BELOW

The opinion of the Second Circuit, rendered on August 11, 1999, is reported at 188 F.3d 65 and is reprinted in the Appendix hereto, App.1, *infra*.

The opinion of the United States District Court for the Southern District of New York, rendered by Magistrate Judge Fox on January 23, 1998, is not officially reported, but is reprinted in the Appendix hereto, App.12, *infra*.

An earlier opinion of the Second Circuit in this case, rendered on November 21, 1994, is reported at 40 F.3d 587 and is reprinted in the Appendix hereto, App.31, *infra*.

An earlier opinion of the United States District Court for the Southern District of New York, rendered by Judge Brieant on April 29, 1994, is not officially reported, but is reprinted in the Appendix hereto, App.42, *infra*.

JURISDICTION

The Second Circuit issued its opinion and judgment on August 11, 1999. No petition for rehearing was filed. This Petition is being filed within 90 days of the entry of that judgment and opinion.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

Congress shall make no law . . . abridging the freedom of speech ...

U.S. Constitution, Amendment XIV, Section 1:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1988 (b):

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The relevant facts of this case are taken from the opinions below and may be summarized as follows:

A. The Factual Background

LaTrieste Restaurant, the Petitioner in this case, operates the Diamond Club, a sports bar that features both music and topless dancing. It is located at 140 Midland Avenue in the Village of Port Chester, New York, in a C-1 commercial zone where live entertainment of any kind is prohibited.

But the site occupied by the Diamond Club is exempt from that restriction by virtue of a "use variation" obtained in 1989 by a previous occupant of the premises. Under the terms of that variance, live music, dancing and other cabaret entertainment are permitted, but only after 10 p.m.[1] This 10 p.m. limitation became the focal point of the ensuing litigation. And that limitation applied only to the occupants of the 140 Midland Avenue site, there being no other sites in Port Chester where cabarets could operate.

The occupant of these premises, who had obtained the "use variation," operated a cabaret known as "The Upper Deck," a name that was later changed to "Pacifics." As the Second Circuit noted, "There is no question that Pacifics violated the zoning restriction by offering cabaret entertainment before 10:00 p.m." App.2, *infra*. Despite that

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[1] The "use variance" took the form of a letter, dated December 19, 1989, from the Village Zoning Board of Appeals to the then occupant stating that "the variance as requested on your application" had unanimously been granted on the condition that "Cabaret hours [are] to start at 10 p.m." Apparently, although not stated in this letter, the cabaret entertainment hours were to end at 2 a.m. According to the District Court below, "Both sides have acknowledged that the [hourly] restriction is valid." App.13, *infra*.

clear violation of the "use variation," the Second Circuit found that "the Village took no action" to enforce the 10 p.m. restriction. *Id.* Pacifics then closed in 1991.

In February of 1992, LaTrieste leased the premises at 140 Midland Avenue. Four months later, it opened an Italian restaurant featuring live music. In the process of obtaining the restaurant's cabaret license, LaTrieste promised the Village Clerk that it would abide by the 10 p.m. restriction. However, the restaurant almost immediately violated the restriction by commencing live music between 7 p.m. and 9 p.m. on Friday and Saturday nights. As the Second Circuit noted, "The Village took no action against the Restaurant" to enforce the restriction. *Id.* LaTrieste's cabaret restaurant closed in March of 1993, following a full year of open violation of the 10 p.m. restriction.

A few months later, on May 13, 1993, LaTrieste re-opened the premises as a sports bar (named The Diamond Club) that featured topless as well as musical entertainment. But the publicity attached to this new operation drew strong public protest and opposition in the Village. Port Chester's police chief told LaTrieste's principals at one point that "I do not want a topless club in my town," and that such an establishment would "not be permitted in Port Chester." In addition, in the summer of 1993, John Branca, the Mayor of the Village, personally picketed The Diamond Club and stated publicly that he opposed any and all topless dancing establishments.[2]

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[2] The District Court below found that "a large group of protesters began picketing the Diamond Club" on July 16, 1993 and "have continued, although the number of protesters has dwindled, to the present day [January 23, 1998]." App.16, *infra*. The court also noted that the location of the picket line "engendered further litigation, culminating in a state appellate decision directing that the picketers move from the parking lot of the strip mall in which the Diamond Club is located to an adjoining sidewalk." *Id.*

Although LaTrieste sought in vain to secure a new "use variance" that would allow the Diamond Club to open prior to 10 p.m.,[3] it is a fact that "[o]n the day the Diamond Club opened, it offered topless dancing before 10 p.m." and "continued to operate in violation of the 10 p.m. restriction until the late summer of 1993." App.14-15, *infra*. For a few months thereafter, the Club abided by the 10 p.m. restriction. But, as the District Court noted, beginning in January of 1994, the Diamond Club "has been offering topless cabaret entertainment prior to 10:00 p.m." and, currently, "the club opens at noon Monday through Friday and at 5:00 p.m. on Saturday and Sunday." App.15, *infra*.

It is also undisputed that after the Village learned of the impending opening of the Diamond Club, which had been widely advertised, LaTrieste received several visits from Village employees concerning other possible building violations. A police officer visited the club "to be sure there wouldn't be any trouble," followed by a fire inspection by the Village building inspector. App.15, *infra*.

On May 13, 1993, LaTrieste received a notice that it had violated the terms of its certificate of occupancy by offering cabaret entertainment beginning at 7 p.m. LaTrieste also received a letter of warning from the New York State Liquor Authority indicating that the Authority "had been informed that the Diamond Club had violated village ordinances." *Id.* Later, on January 1, 1994, LaTrieste received a notice of noncompliance with the 10 p.m. time restriction, followed by the receipt on May 11, 1994, of an "appearance ticket" for violating the 10 p.m. restriction. The District Court stated that "The Village acknowledges that the January and May

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[3] The Zoning Board of Adjustment denied LaTrieste's petition for a new variance allowing topless dancing before 10 p.m. As the Second Circuit noted, the petition "drew major flak from the public," and the Board rejected the petition as "untimely." LaTrieste then began a proceeding in the New York State Supreme Court, challenging the Board's decision under Article 78 of the Civil Practice Law and Rules. The challenge ultimately failed in February of 1994. App.3, *infra*.

1994 notices concerning the 10:00 p.m. restriction were issued in response to citizen complaints." App.16, *infra*.

B. The Court Proceedings Below

Failing to obtain a new use variance allowing the Club to open prior to 10 p.m., LaTrieste commenced the instant case under 42 U.S.C. § 1983 in January of 1994.[4] The case was filed in the federal district court for the Southern District of New York.

As the Second Circuit noted (App.34, *infra*) LaTrieste's complaint alleged that "village officials, by a campaign of harassment intended to put LaTrieste out of business, are denying it equal protection of the laws and interfering with its First Amendment rights." LaTrieste also alleged that the Village intentionally made no effort to enforce the time restriction, created by the 1989 "use variation," as to any cabaret occupying the premises prior to the opening of the Diamond Club on May 13, 1993. The "use variation," in short, lay dormant and unenforced until LaTrieste announced that topless dancing would be included in the new Diamond Club cabaret.

The complaint sought, *inter alia*, declaratory and injunctive relief prohibiting the Village from enforcing the 10 p.m. restriction against the Diamond Club. The parties settled LaTrieste's preliminary injunction application when the Village agreed temporarily to refrain from enforcing the 10 p.m. restriction until resolution of the then pending Article 78 proceeding in the state courts. Several similar settlements of the injunctive application occurred during the progress of the federal action. Finally, the Village agreed not to enforce the 10 p.m. restriction against LaTrieste through March of 1996.

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[4] This federal action was filed on January 18, 1994, while LaTrieste's Article 78 proceeding in the state courts was still pending. See *supra* note 3.

In April 1994, the federal district court granted summary judgment to the Village on two grounds: (1) the Village did not forfeit the right to enforce its 10 p.m. zoning restriction by reason of the prior and repeated failures to enforce it; and (2) LaTrieste was collaterally estopped from relitigating issues it could have raised in the state Article 78 proceeding. App.42, *infra*. In so ruling, the District Court found it "troubling that the Village suddenly decided to enforce the valid limitation on the hours of operation, following LaTrieste's change from a traditional dinner/nightclub to a sports bar/topless cabaret." But the court could find no case law holding that the Village's right to enforce such a time restriction is "lost through continuing neglect." *Id.* at 48, *infra*.

On LaTrieste's appeal, the Second Circuit vacated the District Court's ruling. *LaTrieste Restaurant & Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587 (2d Cir. 1994), reprinted in the Appendix hereto, App.31, *infra*. After rejecting the District Court's ruling that the Article 78 state court proceeding barred the federal court action, the Second Circuit held that there were genuine issues of material fact as to whether the Village had selectively enforced the 10 p.m. restriction against the Diamond Club.

Reversing the summary judgment ruling, the Second Circuit stated there was need for a fuller development of the facts as to the alleged harassment of LaTrieste and the alleged discriminatory enforcement of the 10 p.m. "use variance." The lower court, said the Second Circuit, had failed to "address the heart of LaTrieste's claim, which is not only that the village previously failed to enforce the restrictions, but also that it is now enforcing them selectively, discriminatorily, and for an unconstitutional motive of suppressing free expression." App.36, *infra*.

At the same time and somewhat inconsistently, the Second Circuit stated that "LaTrieste's proofs met the standard of *LeClair*," a standard set in a prior ruling of the Second Circuit (*LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980)).[5] App.37, *infra*. In *LeClair*, which involved an allegedly selective enforcement of a Massachusetts dairy farm regulation, the Second Circuit could find no adequate guidance by this Court as to what is necessary to establish a violation of equal protection based on selective enforcement of a civil statute or regulation. The *LeClair* court accordingly manufactured its own guideline (627 F.2d at 609-10):

> [L]iability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

In support of its thesis that LaTrieste's proofs met this *LeClair* standard, the Second Circuit noted three relevant factors: (1) the fact that the Village did not enforce the 10 p.m. restriction against the cabarets operating on the designated premises prior to the start of topless dancing at those same premises provided "an adequate basis of [equal protection] comparison"; (2) "It appears to be undisputed, and Judge Brieant specifically found, that the village never enforced the 10 p.m. restriction prior to the institution of topless dancing"; and (3) "LaTrieste submitted substantial

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[5] Certiorari was denied in the *LeClair* case, 450 U.S. 959 (No. 80-1025, 1981). The sole question presented in the petition was whether, in a § 1983 action based on an alleged equal protection clause violation, "where the plaintiff does not allege discrimination on the basis of race, religion, intent to inhibit or punish the exercise of constitutional rights, does the plaintiff have to prove, as part of his cause of action, that he was selectively treated based upon a malicious or bad faith intent to injure."

uncontroverted evidence that the village's various enforcement tactics were adopted because it did not want a topless bar operating within its borders." App.37-38, *infra*.

Nevertheless, the Second Circuit treated these proven facts as merely raising questions of material facts that should be resolved at an evidentiary hearing in the District Court. And on the remand, the parties consented to a bench trial before a magistrate judge. See App.12, *infra*.

The critical portions of the magistrate's opinion, as reflected in the subsequent rulings of the Second Circuit, can be summarized as follows:

1. On the critical and undisputed fact that the previous cabaret occupants of the Diamond Club site (who had provided live music, but not topless dancing) had openly violated the 10 p.m. restriction, the Village denied that it knew of these prior violations. To prove that Village officials did know of those violations, one of LaTrieste's owners testified that he had actually seen certain officials in the restaurant cabaret while live bands were performing before 10 p.m. However, the magistrate judge found this testimony "vague and not credible," leading the judge to conclude that "LaTrieste had failed to prove that the Village knew about the violations by the Restaurant or by any previous occupants of the premises." App.5, *infra*.

2. Despite this finding as to lack of knowledge, the magistrate judge concluded that the Village had selectively enforced the 10 p.m. restriction against the Diamond Club. As summarized by the Second Circuit (App.5, *infra*), the magistrate judge

> (1) "found that LaTrieste had proved that the Village selectively treated the Diamond Club when compared to other similarly situated establishments";

(2) "rejected the Village's argument that a finding of selective treatment required proof that the Village knew about other violations of the 10:00 p.m. restriction";

(3) "found that under the circumstances, proof of knowledge was not required, because [the magistrate judge] was satisfied that the Village intended to use a dormant restriction to punish LaTrieste for its constitutionally protected expression"; and

(4) "found that the Village had acted with discriminatory intent during the summer of 1993, when Mayor Branca spoke out against topless dancing."

The Second Circuit did not quote or summarize — or even consider — the magistrate judge's legal justification for making such findings and conclusions. But the judge's opinion makes the justification perfectly clear (App.19-20, *infra*):

It is unclear whether the enforcement of a previously unenforced law can amount to selective enforcement when the defendant had no knowledge of previous violations of that law. The absence of knowledge [of previous violations of the 10 p.m. restriction] may be seen either as an absolute bar to a selective enforcement claim or as evidence arguing against an inference of impermissible intent. In the vast majority of cases, knowledge of previous violations will be required because intent to punish or inhibit the exercise of constitutional rights will be impossible to prove without such knowledge. I am reluctant to say, however, that selective enforcement is not proven when a municipality searches through previously unenforced zoning laws in order to harass an establishment engaged in protected speech. In the

> unique circumstances of this case, in which the intent to use a dormant restriction to punish the Diamond Club for the exercise of protected speech has been demonstrated even though the town's knowledge of previous violations is in doubt, I conclude that the Diamond Club and its predecessors are similarly situated.

The magistrate judge accordingly concluded that the record "makes it clear that [the Village], through the actions of its then-Mayor, enforced the 10:00 p.m. restriction from the time the Diamond Club opened through the summer of 1993 in order to inhibit or punish the exercise of protected speech." App.30, *infra*. He accordingly granted a declaratory judgment that the Village had selectively enforced the 10 p.m. restriction from May 1993 to late summer 1993. But he denied LaTrieste's request for injunctive relief, finding that the constitutional violation was not likely to recur, given the fact that the outspoken Mayor Branca was no longer in office. *Id.*

LaTrieste later applied for an award of some $215,000 in attorneys fees, pursuant to 42 U.S.C. § 1988, claiming that it was the "prevailing party" under that statute. But the application was denied, the magistrate judge holding that LaTrieste was not a "prevailing party" because (1) the declaratory judgment did not alter the parties' legal relationship, and (2) the temporary settlements of the injunctive applications did not constitute relief on the merits.

The Village then appealed the grant of the declaratory judgment to LaTrieste, while LaTrieste cross-appealed the denial of the attorney's fees application.

On this second appellate proceeding, the Second Circuit made two rulings: (1) It reversed the magistrate judge's grant of a declaratory judgment in favor of LaTrieste, and (2) it affirmed the magistrate judge's denial of attorney's fees under § 1988. App.11. *infra*.

On the Village's appeal of the declaratory judgment, the Village claimed (1) that the magistrate judge erred in finding selective enforcement because LaTrieste had not proved that the Village knew about violations of the 10 p.m. restriction before the Diamond Club began featuring topless dancing, and (2) that LaTrieste had not established that the Village intended to punish LaTrieste's constitutionally protected expression because a "substantial portion" of the topless dancing at the Diamond Club went beyond any First Amendment protection. Because the Second Circuit agreed with the Village's first claim, it reversed the magistrate's grant of declaratory judgment without reaching the Village's second claim. App.7, *infra*.

The Second Circuit began its treatment of the Village's claim by repeating its own *LeClair* standard for evaluating civil equal protection claims, i.e., the claimant must ordinarily prove that "(1) compared with others similarly situated, the claimant was selectively treated, and (2) such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person."[6]

LaTrieste, said the court, failed to establish the first element of the *LeClair* test, i.e., it failed to show that the Village officials selectively treated the Diamond Club when compared to similarly situated establishments. And without showing that the Village knew about the previous violations, LaTrieste "would be hard-pressed to show that it was singled out for selective treatment." App.8, *infra*.

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[6] The Second Circuit quoted this test as set forth in a more recent decision, *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12 (2d Cir. July 20, 1999). And the *Lisa's Party City* opinion cited the test as it appeared in the Second Circuit's earlier opinion in the instant *LaTrieste* litigation, 40 F.3d 587 (2d Cir. 1994), which in turn borrowed the test as originally conceived in *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980). See also *supra* note 5.

The court added that even though the Village officials may have opposed LaTrieste's constitutionally protected expression (the topless dancing), "LaTrieste ordinarily cannot establish an equal protection violation unless it shows that the Village consciously applied a different standard of enforcement to similarly situated establishments." *Id.*

The Second Circuit also rejected LaTrieste's claim that "selective treatment is established simply by demonstrating that the zoning restriction was not enforced against the Diamond Club's predecessors — and this without regard to whether the Village knew about the other violations." App.9, *infra*. The answer to that claim, said the court, is found in what it had said in its earlier *LeClair* opinion [627 F.2d at 608]: "Mere failure to prosecute other offenders is not a basis for a finding of denial of equal protection." *Id.*

And since the magistrate judge had found that LaTrieste had failed to introduce credible evidence that Village officials actually knew of the earlier violations, the Second Circuit held that the magistrate judge's conclusion "that the Village selectively treated similarly situated establishments cannot stand." App.9, *infra*. Hence the magistrate's grant of declaratory judgment in favor of LaTrieste was reversed.

But at no point in its opinion did the Second Circuit discuss or analyze the magistrate judge's ruling that where officials use a dormant zoning requirement to harass or punish an establishment engaged in some form of constitutionally protected expression, the establishment need not prove that the officials knew of violations during the period of dormancy but declined to enforce the requirement.

The Second Circuit also rejected LaTrieste's application for attorney's fees, stating that LaTrieste was not the "prevailing party" for purposes of § 1988(b) because the court had just reversed the magistrate judge's grant of a declaratory judgment. Nor did LaTrieste attain "prevailing party" status by obtaining temporary settlements of its injunction applications, since those were "mere procedural maintenance[s] of the status quo." App.10, *infra*.

REASONS FOR GRANTING THE WRIT

1. The Second Circuit's use of "selective enforcement" standards to validate harassing use of a dormant ordinance to discourage First Amendment expressive conduct raises critical constitutional questions.

Nearly twenty years ago, the Second Circuit observed that the "selective enforcement" principle is a "murky corner of equal protection law in which there are surprisingly few cases."[7] Unfortunately, the Second Circuit's opinion in this case adds to the murkiness of that constitutional corner. Only the intervention of this Court can clean out the additional haze, which otherwise may permeate the entire "selective enforcement" jurisprudence of the Equal Protection Clause.

The dominant claim in this prolonged litigation has always been that the Village of Port Chester, annoyed and upset by the prospect of topless dancing at the Diamond Club, began an orchestrated series of harassing techniques. The Village organized public picket lines to block entrance to the Diamond Club; the Village officials began to find a variety of building code violations; and the officials remembered or discovered a dormant zoning variance that could be used to delay opening the Diamond Club at least until 10 p.m. All these harassing techniques were directed solely at the prospective or ongoing "topless dancing," a mode of expressive conduct which is entitled to at least a modicum of First Amendment protection. See *Barnes v. Glen*

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[7] *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980), cert. denied, 450 U.S. 959 (1981). See *supra* note 5.

Theatre, Inc., 501 U.S. 560, 565 (1991) (opinion of Chief Justice Rehnquist).[8]

But the Second Circuit has chosen to ignore these demonstrated harassment facts. And it has chosen to ignore the fact that the magistrate judge, in granting summary judgment to the Petitioner in the instant proceeding, expressly grounded that judgment on his "reluctance" to say "that selective enforcement is not proven when a municipality searches through previously unenforced zoning laws in order to harass an establishment engaged in protected speech." App.19-20, *infra*.[9] In short, the Second Circuit has ruled that LaTrieste, even in a harassment situation, (1) "ordinarily cannot establish an equal protection violation unless it shows that the Village consciously applied a different standard of enforcement to similarly situated establishments," App.8, *infra*, and (2) "the magistrate judge explicitly found that LaTrieste had failed to introduce credible evidence . . . that previous occupants [had] violated

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[8] The Chief Justice, in his *Barnes* opinion, stated that several Supreme Court precedents "contain language suggesting that nude dancing of the kind here involved is expressive conduct protected by the First Amendment." 501 U.S. at 565. Justice Souter's concurring opinion also stated that "performance dancing is inherently expressive." *Id.* at 581. This Court has granted certiorari in *Paps, A.M. v. City of Erie, Pa.*, (No. 98-1161), presumably to clarify the fractured holding in *Barnes* that "totally nude dancing" could be banned under a state public indecency law. This Court may wish to hold the instant petition, which involves only "topless dancing," until the Court resolves the *Paps* case which is scheduled for oral argument on November 10, 1999.

[9] The Second Circuit, in summarizing what it called the "Background" of this case, stated that the magistrate judge did find "that under the circumstances, proof of knowledge [of other violations of the 10 p.m. requirement] was not required because he was satisfied that the Village intended to use a dormant restriction to punish LaTrieste for its constitutionally protected expression." App.5, *infra*. But the court did not address that holding directly, merely finding that "LaTrieste ordinarily cannot establish an equal protection violation unless it shows that the Village consciously applied a different standard for enforcement to similarly situated establishments." App.8, *infra*.

the 10:00 p.m. restriction with the 'full knowledge' of Village officials." App.9, *infra*.

That is the holding that creates a novel and dubious application of the "selective enforcement" concept, a holding that deserves plenary review by this Court. There are no precedents in this Court justifying such a holding. And there seemingly are no conflicting holdings by other Circuits.

But the importance of the Second Circuit ruling remains. That court has found no "harassment exception" to the normal "selective enforcement" concept that a claimant must demonstrate that officials knowingly and consciously applied a different standard of enforcement to similarly situated establishment. That holding has dangerous and important implications for future "selective enforcement" claims of the First Amendment harassment variety.

In this kind of First Amendment harassment case, it makes no sense to impose on the claimant a duty to uncover credible evidence that the governmental officials consciously embargoed a zoning regulation, waiting to apply it until a First Amendment harassment situation arises. Once such a First Amendment situation arises, should not the burden shift to the governmental officials to prove that there is some "compelling governmental interest" justifying such a revival of a dormant regulation?

Those concerns simply are not addressed, let alone answered, by the Second Circuit. It misconceives the "selective enforcement" principle as unitary in nature, one that governs all "selective enforcement" claims, including those that implicate a constitutional right. And, in a First Amendment harassment situation involving enforcement of a dormant regulation, it requires that the claimant perform an impossible task — the presentation of evidence that officials knowingly put a regulation on a shelf with knowledge that there were violations of the regulation during the dormancy period.

If that is to be the law of the land where Equal Protection and First Amendment issues are inherently intertwined, let it come from this Court after a full airing of the constitutional implications of the Second Circuit's ruling.

2. The question of who is the "prevailing party" in this case, for purposes of awarding attorney's fees pursuant to 42 U.S.C. § 1988, deserves consideration by this Court.

The Second Circuit, in rejecting LaTrieste's application for an award of some $215,000 in attorney's fees, held that LaTrieste could not be deemed a "prevailing party" under § 1988(b) inasmuch as (1) the Second Circuit had reversed the lower court's entry of a declaratory judgment in LaTrieste's favor, and (2) the temporary settlements of injunction applications in the lower court did not constitute permanent relief on the merits.

LaTrieste submits this question to the Court to preserve this fee question should this Court grant review and reverse the Second Circuit's rulings on the Equal Protection and First Amendment claims. In that event, the fee application should be remanded to the Second Circuit for determination in light of such action by this Court.

CONCLUSION

For all the foregoing reasons, this Petition for Certiorari should be granted and the opinion rendered by the Second Circuit in this case should be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Nos. 98-7233(L), 98-9073(XAP).

LATRIESTE RESTAURANT, Restaurant and Cabaret Inc., doing business as The Diamond Club and The Diamond Club,

Plaintiffs-Appellees-Cross-Appellants,

Domenick Tamarro, James Savage, Christine Korff, Michael Antaki, Thomas Ceruzzi, Janusz Richards, Zoning Board of the Village of Port Chester, and George O'Hanlon,

Defendants,

v.

VILLAGE OF PORT CHESTER, John Branca, Anthony Fontana, John Belfatto and Carl Verrastro,

Defendants-Appellants-Cross-Appellees.

Argued May 5, 1999.

Decided Aug. 11, 1999.

Gerald Padian, Tashjian & Padian, New York, NY, for Plaintiffs-Appellees-Cross-Appellants.

Gregg D. Minkin, Joseph A. Maria, P.C., White Plains, NY (George O'Hanlon, Port Chester, NY, of counsel), for Defendants-Appellants-Cross-Appellees.

Before: McLAUGHLIN, LEVAL and MICHEL,* Circuit Judges.

McLAUGHLIN, Circuit Judge:

* The Honorable Paul R. Michel, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

BACKGROUND

LaTrieste operates the "Diamond Club," a topless bar in the Village. Although the Diamond Club is located in a zone where live entertainment is prohibited, the site actually occupied by the Diamond Club is exempt from this restriction as a result of a use variance. Under the terms of the variance, live music, dancing, and other cabaret entertainment are permitted only after 10:00 p.m. This time limitation is the crux of this litigation.

The use variance was first obtained in 1989 by a previous occupant of the Diamond Club's premises, "The Upper Deck." The Upper Deck later changed its name to "Pacifics." There is no question that Pacifics violated the zoning restriction by offering cabaret entertainment before 10:00 p.m. However, the Village took no action. Pacifics closed in 1991.

LaTrieste leased the premises in February 1992. Four months later, it opened an Italian restaurant (the "Restaurant") offering live music. In a letter to the Village Clerk following discussions about the Restaurant's cabaret license, Vincent Sorrano, one of LaTrieste's owners, stated that the Restaurant would abide by the 10:00 p.m. restriction. Nevertheless, the Restaurant violated the restriction on weekends by commencing live music between 7:00 p.m. and 9:00 p.m. on Friday and Saturday nights. The Village took no action against the Restaurant. In March 1993, the Restaurant closed.

On May 13, 1993, LaTrieste re-opened as a sports bar providing topless entertainment. Now renamed the "Diamond Club," it attracted strong public opposition in the Village. During the summer of 1993, John Branca, the Mayor of the Village, personally picketed the Diamond Club and made statements to his constituents that he opposed topless dancing establishments. He stated, for example, that "all the resources

of the Village of Port Chester will be used to legally stop the topless bar use in any establishment in the Village."

Like its predecessors, the Diamond Club violated the zoning restriction by featuring topless dancing before 10:00 p.m. on its very opening night. The Village issued a notice of violation, warning LaTrieste that it would lose its certificate of occupancy if it continued to flout the 10:00 p.m. restriction.

LaTrieste then petitioned the Zoning Board of Adjustment (the "Board") for a new variance allowing it to provide topless dancing before 10:00 p.m. The petition drew major flak from the public. The Board rejected the petition as untimely. In September 1993, LaTrieste commenced a proceeding in the New York State Supreme Court challenging the Board's decision under Article 78 of the Civil Practice Law and Rules. This challenge ultimately failed in February 1994.

LaTrieste continued to ignore the 10:00 p.m. restriction during the summer of 1993. The club temporarily began to observe the restriction in late summer 1993 (around the time it commenced its Article 78 proceeding). In late 1993 or early 1994, however, LaTrieste resumed violating the 10:00 p.m. restriction. The Village responded with additional notices of violation, warning LaTrieste that it would lose its certificate of occupancy if it continued to provide live entertainment before 10:00 p.m.

On January 18, 1994, while its Article 78 proceeding was still pending, LaTrieste commenced the instant action against the Village under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York (Brieant, J.). LaTrieste alleged that the Village violated its federal constitutional right to equal protection by selectively enforcing the 10:00 p.m. restriction with the intent to inhibit or punish the exercise of LaTrieste's First Amendment right to show topless dancing. The complaint sought, *inter alia*, declaratory relief, as well as preliminary and permanent

injunctive relief prohibiting the Village from enforcing the 10:00 p.m. restriction against the Diamond Club.

The parties settled the preliminary injunction application when the Village agreed temporarily to refrain from enforcing the 10:00 p.m. restriction until the resolution of the then-pending Article 78 proceeding. As a result of several similar settlements at various stages of the instant litigation, the Village renewed its temporary agreements not to enforce the restriction against LaTrieste through March 1996.

In April 1994, the district court granted summary judgment to the Village on two grounds. First, it found that the Village did not forfeit the right to enforce its zoning restriction through continued prior failures to enforce it. Second, it concluded that LaTrieste was collaterally estopped from relitigating issues it could have raised in the state Article 78 proceeding.

On an earlier appeal, this Court vacated the district court's ruling. *See La Trieste Restaurant & Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 592 (2d Cir.1994). We rejected the district court's conclusion that the Article 78 proceeding barred the federal court action. We also held that there were genuine issues of material fact as to whether the Village had selectively enforced the 10:00 p.m. restriction against the Diamond Club in order to punish or inhibit LaTrieste's constitutionally protected expression. *Id.* at 590-91. In reaching our decision, we emphasized the record evidence that the Diamond Club's predecessor had violated the 10:00 p.m. restriction with the "full knowledge" of the Village officials and that the Village had not enforced the restriction until the Diamond Club began to exhibit topless dancing. *Id.* at 588-89 & n.1.

On remand, the parties consented to a bench trial before Magistrate Judge Fox. It was undisputed that the previous occupants of the Diamond Club site had violated the same 10:00 p.m. restriction. The Village denied, however, that it knew of these prior violations.

To show that the Village did know about the violations, Vincent Soranno, one of LaTrieste's owners, testified that the Restaurant had advertised live music with start times before 10:00 p.m. and that he had actually seen certain Village officials in the Restaurant while live bands were performing before 10:00 p.m. However, the magistrate judge found Sorrano's testimony vague and not credible. The magistrate judge concluded that LaTrieste had failed to prove that the Village knew about the violations by the Restaurant or by any previous occupants of the premises.

Despite this finding of lack of knowledge, the magistrate judge concluded that the Village had selectively enforced the restriction against the Diamond Club. First, he found that LaTrieste had proved that the Village selectively treated the Diamond Club when compared to other similarly situated establishments. He rejected the Village's argument that a finding of selective treatment required proof that the Village knew about other violations of the 10:00 p.m. restriction. He found that under the circumstances, proof of knowledge was not required because he was satisfied that the Village intended to use a dormant restriction to punish LaTrieste for its constitutionally protected expression. Second, the magistrate judge found that the Village had acted with discriminatory intent during the summer of 1993, when Mayor Branca spoke out against topless dancing.

Accordingly, the magistrate judge granted LaTrieste a declaratory judgment that the Village had selectively enforced the 10:00 p.m. restriction from May 1993 to late summer 1993. However, he denied LaTrieste's request for injunctive relief, finding that the constitutional violation was not likely to recur, given the fact that Mayor Branca was no longer in office.

LaTrieste subsequently applied for an award of approximately $215,000 in attorneys' fees pursuant to 42 U.S.C. § 1988, claiming that it was a "prevailing party" under the statute. It argued that it was a prevailing party as a result of: (1) the grant of a declaratory judgment; and (2) the

successful temporary settlements of its various injunction applications. The magistrate judge denied the fee application, holding that LaTrieste was not a "prevailing party" because: (1) the declaratory judgment did not alter the parties' legal relationship; and (2) the temporary settlements of the injunction applications did not constitute relief on the merits.

The Village now appeals the grant of the declaratory judgment to LaTrieste. LaTrieste cross-appeals the magistrate judge's decision denying its attorneys' fees application.

DISCUSSION

I. Selective Enforcement

On appeal from a bench trial, the district court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. *See Lopresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997).

The Village maintains that the magistrate judge erred in finding selective enforcement for two reasons: (1) because it failed to show that the Village knew about violations of the 10:00 p.m. restriction before the Diamond Club began featuring topless dancing, LaTrieste did not establish that it was selectively treated; (2) LaTrieste did not establish that the Village intended to punish LaTrieste's constitutionally protected expression because a "substantial portion" of the conduct taking place at the Diamond Club was not protected by the First Amendment. Because we agree with the first argument that LaTrieste failed to establish selective treatment we need not address the Village's second argument.

The Equal Protection Clause of the Fourteenth Amendment is "essentially a direction that all persons similarly situated be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed2d 313 (1985). "In order to establish a violation of equal protection based on selective enforcement, the plaintiff must ordinarily show (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as . . . intent to inhibit or punish the exercise of constitutional rights." *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 15-17 (2d Cir.1999) (quotations and citations omitted).

LaTrieste failed to establish the first element of its selective enforcement claim—that the Village selectively treated the Diamond Club when compared to similarly

situated establishments. While there is no doubt that the previous occupants of the premises violated the zoning restriction and that the Village did not enforce the restriction against them, LaTrieste failed to show that the Village knew about these violations. Absent such proof, LaTrieste would be hard-pressed to show that it was singled out for selective treatment. *See United States v. Fares*, 978 F.2d 52, 60 (2d Cir.1992) (rejecting criminal selective prosecution claim because defendant failed to introduce "evidence as to large numbers of similarly situated persons known to the government"); *see also Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); *Shumway v. UPS*, 118 F.3d 60, 64-65 (2d Cir.1997).

The magistrate judge apparently concluded that knowledge of other violations was not essential and was relevant only as some evidence of the second element of a selective enforcement claim: the Village's discriminatory purpose. If that was his position, we disavow it. A plaintiff generally must satisfy both elements to establish a claim of selective enforcement, *see Zahra v. Town of Southold*, 48 F.3d 674, 684 (2d Cir.1995), and knowledge is ordinarily required to establish the first element.[1] Thus, even assuming that the conduct and statements of Mayor Branca reveal the Village's opposition to LaTrieste's constitutionally protected expression, LaTrieste ordinarily cannot establish an equal protection violation unless it shows that the Village consciously applied a different standard of enforcement to similarly situated establishments. *See McCleskey v. Kemp*,

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[1] We do not hold that knowledge will be required in every case. It is conceivable that selective treatment could be shown where, for example, proof was offered that a municipality did not know of prior violations because it adhered to a see-no-evil policy of not enforcing an ordinance, and then abandoned that policy with respect to a violator engaged in protected activity. In this case, however, LaTrieste has not explicitly called our attention to proof supporting this, or any other such alternative theory of selective treatment. Accordingly, any such alternative arguments are waived. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir.1998).

481 U.S. 279, 292-93, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (part of Equal Protection challenge is proof that "purposeful discrimination 'had a discriminatory effect'") (*quoting Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985)).

LaTrieste asserts that selective treatment is established simply by demonstrating that the zoning restriction was not enforced against the Diamond Club's predecessors—and this without regard to whether the Village knew about the other violations. However, "[m]ere failure to prosecute other offenders is not a basis for a finding of denial of equal protection." *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir.1980). Instead, "selective prosecution implies that a selection has taken place." *United States v. Armstrong*, 517 U.S. 456, 469, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (internal quotations and alterations omitted). Absent a showing that the Village knew of other violations, but declined to prosecute them, LaTrieste would ordinarily be unable to show that it was treated selectively. *See id.* at 470, 116 S.Ct. 1480.

Contrary to LaTrieste's assertions, we did not suggest in the earlier appeal by LaTrieste that selective treatment could be established even if the Village did not know that other establishments had violated the restriction. To the contrary, we specifically pointed out that the record contained some evidence that previous occupants violated the 10:00 p.m. restriction with the "full knowledge" of Village officials. *LaTrieste*, 40 F.3d at 588 & n.1. After presiding over trial, however, the magistrate judge explicitly found that LaTrieste had failed to introduce credible evidence of such knowledge. LaTrieste does not challenge this finding on appeal. Because the Village did not know about any other violations of the 10:00 p.m. restriction, and LaTrieste has pointed to no alternative proof of discriminatory enforcement, the magistrate judge's conclusion that the Village selectively treated similarly situated establishments cannot stand.

Accordingly, the declaratory judgment in favor of LaTrieste is reversed.

II. Attorney's Fees

The decision to grant or deny an application for attorneys' fees is reviewed for an abuse of discretion. *See LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 757 (2d Cir.1998).

To be eligible for attorneys' fees, a civil rights plaintiff must be a "prevailing party." 42 U.S.C. § 1988(b). To qualify as a prevailing party, the "plaintiff must obtain at least some relief on the merits of his claim." *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

LaTrieste argues that it is a prevailing party as a result of: (1) the declaratory judgment; and (2) the favorable settlements of its various injunction applications. Given our reversal of the declaratory judgment, LaTrieste's first argument cannot provide a basis for finding LaTrieste a prevailing party.

We also reject LaTrieste's second argument—that its temporary settlements of the injunction applications render it a prevailing party. Although a party can sometimes attain "prevailing party" status by obtaining temporary relief, it can do so only when the decision to grant such relief is on the merits. *See Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir.1997). We consider the Village's temporary agreements not to enforce the 10:00 p.m. restriction "mere procedural maintenance[s] of the status quo," *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir.1994) (*quoting Webster v. Sowders*, 846 F.2d 1032, 1036 (6th Cir.1988)), rather than relief on the merits. The magistrate judge properly denied attorneys' fees.

CONCLUSION

We have considered the parties' remaining contentions and find them to be without merit. The declaratory judgment in favor of LaTrieste is reversed. The district court's denial of attorneys' fees is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LATRIESTE RESTAURANT AND CABARET, INC., d/b/a THE DIAMOND CLUB,

Plaintiff,

– against –

THE VILLAGE OF PORT CHESTER, JOHN BRANCA, ANTHONY FONTANA, CARL VERRASTRO and JOHN BELFATTO,

Defendants

94 CIV 0252 (BDP) (MDP)
DECISION

LaTrieste Restaurant and Cabaret, Inc. ("LaTrieste"), which operates a topless cabaret in the Village of Port Chester ("Village"), brought this action pursuant to 42 U.S.C. § 1983, alleging that the Village selectively enforced a use restriction on the premises in an attempt to inhibit or punish the exercise of Plaintiff's First Amendment rights. The parties consented to trial before me on October 17, 1996. I conducted a bench trial in this case on October 21st, October 22nd, October 23rd, and November 20th of 1997. For the reasons that follow, I find that Defendant selectively enforced the restriction in question against Plaintiff. However, Plaintiff has not demonstrated that it is entitled to injunctive relief. The following constitutes my findings of fact and conclusions of law.

LaTrieste Restaurant and Cabaret d/b/a The Diamond Club operates at 140 Midland Avenue in the Village of Port Chester. (Tr. 18) It is located in a C-1 commercial zone, in which cabaret entertainment is not allowed. (Tr. 203, 425) In 1989, a prior occupant of the premises, which was then known as The Upper Deck, requested and was granted a special exception allowing it to provide cabaret entertainment between the hours of 10 p.m. and 2 a.m. Both sides have acknowledged that the restriction is valid. (Tr. 5)

The Upper Deck changed its name to Pacifics, and Pacifics closed in 1991. One June 10, 1992, LaTrieste Restaurant and Cabaret, Inc., opened an Italian restaurant named LaTrieste at 140 Midland Avenue. (Tr. 20) Prior to the opening of LaTrieste Restaurant, Vincent Soranno, one of LaTrieste's principals, signed a letter to the Village Clerk, representing that LaTrieste Restaurant and Cabaret would not provide cabaret entertainment before 10 p.m. In September or October of 1992, LaTrieste began offering live entertainment on Friday and Saturday nights. Bands would begin to play between 7:00 and 9:00 p.m. Plaintiff produced undisputed evidence that it violated the restriction on cabaret entertainment before 10:00 p.m. while it was operating as an Italian restaurant and that the Village did not enforce the restriction during that time. (Tr. 21-28, 303, 306) Plaintiff also produced evidence that cabaret entertainment began before 10 p.m. while Pacifics was in operation. (Tr. 280-84)

It is less clear, however, whether the Village knew that the 10:00 p.m. restriction was being violated prior to the opening of the Diamond Club. Mr. Soranno's testimony concerning both the publicity generated for cabaret entertainment and the personal knowledge of Village officials that the restriction was being violated lacked specificity. LaTrieste and the bands scheduled to perform there circulated flyers in Port Chester indicating that live music would be performed at LaTrieste. These flyers included start times before 10 p.m. (Tr. 26-30) On Sundays LaTrieste offered "Latin night," and the bands that were

performing hung banners indicating that music would start before 10:00 p.m. (Tr. 28)

Mr. Soranno claimed that on one occasion John Belfatto, a building inspector for the Village, came into LaTrieste Restaurant for a retirement party between 7:30 and 8:00 p.m. while a disc jockey was playing. (Tr. 32) On cross-examination, Mr. Soranno stated that Mr. Belfatto arrived between 8:00 or 9:00 p.m., give or take a half an hour. (Tr. 99) This allegation is too lacking in specificity to be credible, especially given Mr. Belfatto's statement that he arrived around 10:00 p.m. and that there was no entertainment going on at the time. (Tr. 702) Likewise, Mr. Belfatto denied having a conversation with Mr. Soranno after the opening of the Diamond Club in which Mr. Belfatto told Mr. Soranno that the variance had not been enforced prior to the opening of the Diamond Club because Mr. Belfatto knew that the restaurant was struggling financially. (Tr. 576, 702)

Furthermore, Mr. Soranno's statement that he saw Village police officers present when live bands played before 10:00 p.m. at LaTrieste Restaurant is too vague to carry weight since Mr. Soranno could not identify the officers or state on which occasions he saw them on the premises of LaTrieste. (Tr.551-52) Under those circumstances, Mr. Soranno's testimony does not prove that police officers observed live entertainment before 10:00 p.m. Plaintiff's proof at trial was not sufficient to establish by a preponderance of the evidence that the Village had knowledge of violations of the 10:00 p.m. restriction by LaTrieste Restaurant or any other prior occupants of the premises.

In March 1993, LaTrieste Restaurant closed. (Tr. 116) On May 13, 1993, LaTrieste Restaurant and Cabaret, Inc. opened the Diamond Club at 140 Midland Avenue. The Diamond Club characterizes itself as a sports bar offering topless dancing. (Tr. 35) The majority of the topless dancing takes place on or near the patrons' tables. (Tr. 154-55) On the day the Diamond Club opened, it offered topless dancing before

10 p.m. The Diamond Club continued to operate in violation of the 10 p.m. restriction until the late summer of 1993. From the late summer of 1993 until December of 1993 or January of 1994, it abided by the 10:00 p.m. restriction. (Tr. 79) Since that time, the Diamond Club has been offering topless cabaret entertainment prior to 10:00 p.m. Currently the club opens at noon Monday through Friday and at 5:00 p.m. on Saturday and Sunday. (Tr. 199-200)

It is undisputed that after the Village learned of the impending opening of the Diamond Club, LaTrieste received several visits from village employees concerning building violations as well as several notices of violation. LaTrieste received a notice of violation on May 10, 1993, for hanging awning signs in violation of the Village building code. This violation culminated in a fine in September or October of 1993. (Tr. 45-46) The Diamond Club also received a visit from Police Officer Tedesco in the afternoon of May 13, 1993 during which Officer Tedesco allegedly indicated that he wanted to be sure there wouldn't be any trouble. (Tr. 41) This visit was closely followed by a visit from Mr. Belfatto and building inspector Anthony Fontana between 4:00 and 4:30 p.m. on May 13, 1993 for a fire inspection. (Tr. 43) Also on May 13, 1993, LaTrieste received a notice for violating the terms of its certificate of occupancy by offering cabaret entertainment at 7:00 p.m. (Tr. 47) Shortly after the opening of the Diamond Club, LaTrieste received a letter of warning from the New York State Liquor Authority indicating that the State Liquor Authority had been informed that the Diamond Club had violated village ordinances. LaTrieste received notices of violation concerning a pole sign on June 16, 1993 and another awning sign violation on October 1, 1993. (Tr. 49-50) LaTrieste received a notice of violation dated January 1, 1994 for noncompliance with the 10:00 p.m. restriction. The notice contained a warning that future violations would result in the revocation of the Diamond Club's certificate of occupancy. (Tr. 81-82) LaTrieste also received an appearance ticket on May 11, 1994 for violation of the 10:00 p.m. restriction. The Village

acknowledges that the January and May 1994 notices concerning the 10:00 p.m. restriction were issued in response to citizen complaints. (Tr. 169, 657)

LaTrieste petitioned the Zoning Board of Adjustment for a new use variance allowing it to open prior to 10:00 p.m. (Tr. 71, 429) That petition was rejected. Plaintiff's subsequent Article 78 proceeding appealing the Zoning Board of Adjustment's decision was unsuccessful. (Tr. 444) The applicability of the variance to LaTrieste is therefore not at issue in this case. (Tr. 432)

It is evident from the events following the Diamond Club's opening that a segment of the Village's population was unhappy with the presence of a topless club in the Village. Opposition to LaTrieste's request for relief from the 10:00 p.m. restriction was strong. (Tr. 201) On July 16, 1993, a large group of protesters began picketing the Diamond Club. (Tr. 273-74) These protests have continued, although the number of protesters has dwindled, to the present day. (Tr. 76) The location of the picket line engendered further litigation, culminating in a state appellate decision directing that the picketers move from the parking lot of the strip mall in which the Diamond Club is located to an adjoining sidewalk. (Tr. 453)

LaTrieste commenced the instant case under 42 U.S.C. § 1983 in January 1994, claiming that the Village violated its constitutional right to equal protection by selectively enforcing the 10:00 p.m. restriction. The District Court granted the Village's motion for summary judgement. That decision was reversed and the case remanded on November 21, 1994 by the Second Circuit Court of Appeals. *LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester,* 40 F. 3d 587 (2d Cir. 1994).

In the period since the Second Circuit's reversal of the summary judgement decision, the posture of the case has changed. Plaintiff has abandoned its claims for damages (Tr. 2) and seeks only injunctive relief.[1] With these facts in mind, I turn to the question of whether the Village selectively enforced the 10 p.m. ordinance against the Diamond Club.

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[1] It is unclear whether Plaintiff seeks an injunction against the individual defendants. In any event, even if I were to grant injunctive relief against the Village, I would deny it as to the individual defendants because Plaintiff has failed to show any need for such an injunction. Mr. Fontana is deceased, Mr. Branca is no longer the mayor of Port Chester and is not employed by the Village, Mr. Verrastro is no longer the Police Chief of Port Chester and is not employed by the Village, and Plaintiff has failed to demonstrate any intent to discriminate on the part of Mr. Belfatto. The only evidence of animus on the part of Mr. Belfatto advanced by Plaintiff was the alleged statement to Mr. Soranno that Mr. Belfatto had refrained from enforcing the restriction against LaTrieste Restaurant because the restaurant was struggling financially. Even if this conversation occurred, it does not lead to an inference of discriminatory intent.

LIABILITY UNDER SECTION 1983

Selective enforcement in violation of the equal protection clause occurs if "(1) the person, compared with others similarly situated, was selectively treated; and (2)... such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994), *quoting LeClair v. Saunders,* 627 F.2d 606, 609-10 (2d Cir. 1980), *cert. denied* 450 U.S. 959 (1981).

Whether similarly situated entities were treated differently

In a selective enforcement action, the plaintiff must demonstrate that others similarly situated were treated differently. In this case, however, the 10:00 p.m. restriction governs only the premises of 140 Midland Street. There were at the time of the events described above, apparently no comparable restrictions elsewhere in the Village. The Second Circuit has held that "the comparison of the town's enforcement of the 10 p.m. restriction against the same premises prior to the start of topless dancing with its enforcement afterwards, can provide an adequate basis of comparison." *LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994). Those similarly situated to the Diamond Club for purposes of a selective enforcement action are therefore the previous occupants to whom the restriction applied: The Upper Deck, Pacifics, and LaTrieste Restaurant.

The question thus arises whether the Upper Deck, Pacifics, and LaTrieste were similarly situated to the Diamond Club given that, as I have found, the Village lacked knowledge of the violations of the restrictions engaged in by the Diamond Club's predecessors. At least one case indicates

that such knowledge is a prerequisite to a finding that entities are similarly situated. In *Nichols v. Pelham Manor*, 974 F. Supp. 243, 255 (S.D.N.Y. 1997), the plaintiff claimed that the defendant selectively enforced ordinances regarding solicitation against those soliciting on behalf of minor political parties. The Court observed that the plaintiff did not:

> present direct evidence that the Village knew that persons were soliciting on behalf of major parties without permits, despite the fact that such knowledge is a prerequisite to the sort of selective enforcement claim brought here. *See Shumway v. United Parcel Service*, 118 F. 3d 60, 64-65 (2d Cir. 1997) (upholding summary judgement because "[i]t is impossible to demonstrate that UPS treated similarly situated males differently when there is not evidence that UPS knew about any other violations of the 'no fraternization' rule").

The Court denied summary judgement to defendant, however, because the plaintiff had come forth with evidence that twelve persons were soliciting on behalf of political parties during the same period in the small town of Pelham Manor, giving rise to a potential inference that the village knew of similarly situated solicitors.

It is unclear whether the enforcement of a previously unenforced law can amount to selective enforcement when the defendant had no knowledge of previous violations of that law. The absence of knowledge may be seen either as an absolute bar to a selective enforcement claim or as evidence arguing against an inference of impermissible intent. In the vast majority of cases, knowledge of previous violations will be required because intent to punish or inhibit the exercise of constitutional rights will be impossible to prove without such knowledge. I am reluctant to say, however, that selective enforcement is not proven when a municipality searches through previously unenforced zoning laws in order to harass

an establishment engaged in protected speech. In the unique circumstances of this case, in which the intent to use a dormant restriction to punish the Diamond Club for the exercise of protected speech has been demonstrated even though the town's knowledge of previous violations is in doubt, I conclude that the Diamond Club and its predecessors are similarly situated.[2]

Intent to punish or inhibit the exercise of constitutional rights

LaTrieste claims that Defendant enforced the 10:00 p.m. restriction in order to inhibit or punish the exercise of its right to free speech under the First Amendment. The Village argues that the speech engaged in by LaTrieste was

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[2] Plaintiff relies heavily on *People v. Acme Markets, Inc.* 37 N.Y.2d 326 (1975), in which the New York Court of Appeals found selective enforcement when the state's Sunday closing law was enforced only against supermarkets against whom complaints were made. The complaints in question were apparently made by union members as a result of a dispute between a union and certain supermarkets. The Court found that "enforcement [of the Sunday closing law] has been totally surrendered to private parties and interest groups who without constraint may manipulate the law for purely private purposes. This is an unseemly state of affairs openly inviting discrimination and harassment of one group by another." *Id.* at 331.Plaintiff claims that in this case, as in *Acme*, the government's desire to placate private individuals who sought to close down the Diamond Club led the government to engage in selective enforcement. *Acme* is distinguishable in a number of ways. It was decided under state law and its applicability in the context of Section 1983 claims is uncertain. In *Acme*, the enforcing entity had actual knowledge of widespread violations that were not enforced. Furthermore, *Acme* does not stand for the proposition that all systems of enforcement that rely on complaints constitute selective enforcement. *See Harvey v. City of Utica*, No. 96-CV-831, 1997 WL 67785 (N.D.N.Y. Feb 13, 1997) (Plaintiff did not allege that the City acted against him in code enforcement on a constitutionally impermissible basis. "Instead, [plaintiff] claims that the City chose which code violations to pursue on the basis of citizen complaints, an eminently reasonable and non-discriminatory basis.")

unprotected and that LaTrieste presented insufficient evidence of impermissible intent on the part of the Village.

Nude dancing is expressive conduct protected by the First Amendment, although it operates at the margins of the First Amendment. *LaTrieste Restaurant and Cabaret, Inc. V. Village of Port Chester*, 40 F.3d 587, 590-91 (2d Cir. 1994), *citing Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). It is undisputed that protected conduct, i.e., topless dancing, took place and continues to take place at the Diamond Club. I also find that unprotected conduct has taken place at the Diamond Club. New York State Liquor Authority inspector Thomas Healy credibly testified that on August 20, 1993, he observed conduct at the Diamond Club that was lewd and obscene.

The Village has not demonstrated that unprotected conduct predominated to such an extent that the Diamond Club was not entitled to any First Amendment protection. Furthermore, Defendant's argument that the intent of the Village was, if anything, to inhibit only unprotected conduct, finds no support in the record. As I will discuss below, Mayor Branca, repeatedly expressed his opposition to the Diamond Club in terms of opposition to topless dancing, a protected activity. I also note that the selective enforcement in this case began prior to Inspector Healy's August 1993 visit to the Diamond Club. There is no evidence that lewd and obscene conduct was occurring, for example, on May 13, 1993, when the Diamond Club was first informed that they were in violation of the 10:00 p.m. restriction.

Plaintiff informed me at trial that its only claim of selective enforcement stems from the enforcement of the 10:00 p.m. restriction. It points to the sign violations, the fire inspection, and the reporting of violations to the State Liquor Authority as evidence of the Village's intent to punish protected speech. The attention paid to the Diamond Club by Village officials on the first day of topless dancing does provide some evidence to support that conclusion. However, the Village has proffered reasonable explanations for most of its conduct. It was Village policy to forward violations to the

State Liquor Authority. (Tr. 161) LaTrieste's awning signs were put up without a permit. (Tr. 535) The pole sign violation was issued only after Mr. Soranno represented to the Village that he would remove it and failed to do so. (Tr. 541-42)

Plaintiff failed to provide evidence concerning the frequency of sign or other code enforcement in Port Chester. It also failed to detail the level of scrutiny customarily afforded new businesses in Port Chester by village officials. Without such evidence, it is impossible to determine whether the treatment afforded the Diamond Club was anomalous. The Village presented evidence that code violations concerning sign enforcement occurred in other instances. (Def. Exh. BBB 1-14) I note that in July 8, 1991, LaTrieste's predecessor, Pacifics, was cited for numerous violations, (Tr. 661) one of which was for an unauthorized pole sign. (Tr. 666-67)

Plaintiff has, however, demonstrated an intent to discriminate on the part of the mayor at the time of these events, John Branca. Mr. Branca was mayor of Port Chester between March 1993 and March 1995. (Tr. 196) He acknowledged at trial that it was his personal opinion that topless dancing was not a correct use for the Village of Port Chester. (Tr. 208) It is also undisputed that Mr. Branca picketed The Diamond Club, (Tr. 76-77) although he characterizes his presence at the picket as an attempt to maintain order. Mr. Branca denies that complaints concerning the Diamond Club were treated any differently than other complaints. (Tr. 263) Mr. Branca instructed Mr. Fontana to enforce the 10:00 p.m. restriction in response to citizen complaints. (Tr. 227) He acknowledged that he may have asked the police department to investigate the Diamond Club's hours of operation. (Tr. 242) These facts alone do not necessarily indicate an intent to engage in selective enforcement.

Mr. Branca is entitled to a personal opinion on topless dancing and he is entitled to picket. His personal opposition to topless dancing and his picketing the Diamond Club do not alone give rise to an inference of selective enforcement. It is difficult, however, to avoid the conclusion that Mr. Branca, acting in his capacity as mayor, sought to inhibit or punish the exercise of a constitutional right in light of his statements to the press and letters to his constituents between April and August of 1993. Mr. Branca stated that he would do everything within legal means to dissuade the use of topless dancing in the Village. (Tr. 212) He wrote to a constituent that "all the resources of the Village of Port Chester will be used to legally stop the topless bar use in any establishment in the Village of Port Chester." (Tr. 236) He informed another constituent that "we do not want topless dancing in any structure of this village." (Tr. 239) These comments are not confined to expressions of personal feeling, and in light of them, it is apparent that it is not coincidence that the 10:00 p.m. restriction was enforced for the first time on the Diamond Club's opening day. I find that Plaintiff has proven, by a preponderance of the evidence, that Mayor Branca acted with intent to deprive Plaintiff of its constitutional rights.

Plaintiff has failed to demonstrate intent to discriminate on the part of other village officials. Former Police Chief Carl Verrastro acknowledged that he may have told a newspaper reporter that he thought a topless bar was an inappropriate use but that the Village was powerless to stop it. Mr. Soranno testified that Mr. Verrastro make essentially the same comment to him. (Tr. 86) The law does not require Mr. Verrastro to be pleased with the opening of a topless cabaret and these statements alone do not prove intent to act unconstitutionally.

Likewise, Plaintiff has not demonstrated that Mr. Belfatto acted with discriminatory intent. Mr. Belfatto testified that he acted upon complaints that were received by the building department, which does not in and of itself constitute selective enforcement. (Tr. 689) He credibly denied the statement attributed to him by Mr. Soranno. (Tr. 702) I found no evidence of intent to punish protected speech on the part of Mr. Fontana.

The Village's position that it did not act with intent to punish protected speech is not bolstered by its failure to provide any other rationale for its action. *See Contractors Against Unfair Taxation Instituted on New Yorkers v. City of New York*, No. 93 CIV 4718, 1994 WL 455553 (S.D.N.Y. Aug. 19, 1994) (no violation of equal protection when Defendant's intent was to raise revenue); *Dubuc v. Green Oak Township*, 958 F.Supp. 1231, 1236 (E.D.Mich. 1997) (intent to impermissibly selectively enforce does not include the intent to concentrate resources on notorious or easy to locate violators). No evidence was adduced, for example, that the Village was motivated to enforce the 10:00 p.m. restriction out of a desire to eliminate secondary problems unique to a topless cabaret.

I find that the Village engaged in unconstitutional selective enforcement from the period of May 1993 to the late summer of 1993 when the Diamond Club began temporarily complying with the 10:00 p.m. restriction.

RELIEF

The more difficult question posed by this case is whether Plaintiff is entitled to injunctive relief, which is the only relief it seeks. Injunctive relief is available only when plaintiff has succeeded on the merits. *Turley v. New York City Police Department*, no. 93 CV 8748, 1997 WL 529012 (S.D.N.Y. Aug. 25, 1997). In addition, to obtain a permanent injunction, "a party must show the absence of an adequate remedy at law and irreparable harm if the relief is not granted." *Id., quoting New York State Nat. Org. For Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989). "The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that a plaintiff will be wronged again." *Id., quoting City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). It is difficult to obtain injunctive relief in a selective enforcement case. *Gersten v. Rundle*, 833 F.Supp. 906, 914 (S.D.Fl. 1993), *aff'd* 56 F.3d 1389 (1995), *cert. den.* 116 S.Ct. 924 (1996) ("It is the exceptional case where a plaintiff is able to convince a federal district court to issue injunctive relief to prevent what he alleges to be selective enforcement by a state. The Supreme Court has cautioned federal courts to generally refrain from interfering in prosecutorial or enforcement decisions because the judiciary is ill-suited to examine the various factors that are relevant to such determinations."); *Barnes Foundation v. Township of Lower Merion*, 927 F. Supp. 874, 880 n. 11 (E.D.Pa. 1996) (expressing concern that granting relief sought by plaintiff—enjoining selective enforcement, harassment, and other impermissible behavior—would pose a "threat to the Township's ability to govern and enforce its laws, and may be an improper usurpation of power by the federal court").

Injunctive relief in a selective enforcement case poses a dilemma. The restriction in this case, as in all selective enforcement cases, is valid. The Village was and remains entitled to enforce the restriction against the Diamond Club, assuming that the Village officials do not do so with an intent to inhibit or punish protected speech. For that reason, the parties apparently agree that the proper enforcement of a valid 10:00 p.m. restriction cannot be enjoined. *See 303 West 42nd St. v. Klein*, 46 N.Y.2d 686, 694 (1979) (selective enforcement claim "should not result in immunization from a new prosecution when and if the public authorities cure the defects in their enforcement methods"); *Geaneas v. Willets*, 911 F.2d 579, 588 (11th Cir. 1990), *cert. den.* 499 U.S. 955 (1991) ("The district court held that the plaintiffs failed to prove a selective enforcement claim, but even if the plaintiffs could prove their claim, an injunction would not necessarily prevent the City from enforcing the ordinance against them. The court would enjoin the City not to enforce the ordinance against the plaintiffs selectively. The City could satisfy such a mandate simply by enforcing the ordinance against all similarly situated violators. Thus, even if the plaintiffs were to succeed on this selective enforcement claim, they could not escape the ordinance's application to them; they could only require the City to enforce it more widely—a result that is clearly not what the plaintiffs desire."); *J&B Social Club, #1, Inc. v. City of Mobile*, 920 F.Supp. 1241, 1245 n. 10 (S.D. Ala. 1996); *Cohran v. State Bar of Georgia*, 790 F.Supp. 1568, 1573-74 (N.D. Ga. 1992) ('[O]rdering the state to cease selective enforcement of its disciplinary rules would not necessarily afford plaintiff any relief. The state could comply with such an order by sanctioning every other member of the bar who was similarly situated rather than rescinding the action against plaintiff.") In this case, of course, broader enforcement of the 10:00 p.m. restriction is impossible because it applies only to the premises at 140 Midland Avenue.[3]

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[3] I note that evidence was presented at trial that the Village now has at least two businesses—an auto body shop and a bakery—with restrictions

I will turn to the three types of injunctive relief requested by Plaintiff in its post-trial brief. Plaintiff presented virtually no evidence concerning the necessity for an injunction, i.e., that there is a real and immediate threat that Plaintiff will be harmed in the future. This failure is fatal to Plaintiff's request for injunctive relief.

Plaintiff requests that Defendant be enjoined from pursuing pending administrative proceedings to revoke LaTrieste's certificate of occupancy. I assume that this request refers to the January 1994 notice of violation informing Plaintiff that future failure to comply with the 10:00 p.m. restriction would result in revocation of LaTrieste's certificate of occupancy. Apparently, the Village voluntarily took no further action concerning this notice, presumably because of the commencement of this litigation. The status of this "proceeding" was not elaborated on at the trial and, in fact, there was no proof that there is a pending proceeding to be enjoined.

It is unproven, furthermore, that Mayor Branca had anything to do with the January 1994 notice of violation. Although I assume that Mayor Branca's opinion of the Diamond Club did not change between August 1993 and the 1994 violations, his involvement in the 1994 violations has not been demonstrated. Although it is reasonable to infer that Mayor Branca directed that the 10:00 p.m. restriction be enforced in the period of time during which the Mayor was picketing and writing the aforementioned letters to the protesters, his connection to the events that occurred after the Diamond Club ceased compliance with the restriction, after approximately four months of compliance, have not been established.

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on their hours of operation (or at least on the times during which they can make noise). In the future, comparison of the enforcement of these restrictions with the 10:00 p.m. restriction on the Diamond Club might be useful.

Nor has Plaintiff demonstrated that the complaints pursuant to which the January 1994 notice of violation was issued were made by persons seeking to inhibit or punish protected speech. Even if I assumed that enforcing the restriction because of the complaints of private citizens with discriminatory motive could state a cause of action, Plaintiff has not made such a showing here. Although Mayor Branca indicated that he acted on complaints from protesters, we do not know that the motivation of the complaint that gave rise to the January 1994 notice nor do we know the identity of the person or persons making the complaint.

The same logic necessitates the denial of Plaintiff's request for relief enjoining "quasi-criminal proceedings" allegedly pending in village court. I assume, although Plaintiff does not make it clear, that this request refers to the notice of appearance described in the testimony of Lenny Cusamano. Mr. Cusamano, a housing inspector, testified that he served a notice of appearance on LaTrieste in May 1994 after ascertaining on the basis of a number of visits that the Diamond Club was violating the 10:00 p.m. restriction. (Tr. 650, 653) No evidence of impermissible intent on the part of Mr. Cusamano was adduced. (Tr. 657) Mr. Cusamano testified that Mr. Fontana told him to investigate the Diamond Club's hours of operation in response to citizen complaints.

As is the case with the request to enjoin the pending administrative proceeding, the existence of a pending proceeding was not established at trial. Plaintiff showed no connection between Mayor Branca's impermissible intent (or that of the protesters) and the May 1994 notice of appearance in any event. For those reasons, Plaintiff's request for injunction of pending quasi-criminal proceedings is denied.

Plaintiff also requests an injunction preventing the Village from selectively enforcing the 10:00 p.m. restriction. Injunctive relief enjoining unconstitutional conduct has been awarded in some cases. *Allee v. Medrano*, 416 U.S. 802 (1974); *Black Jack Distributors, Inc. v. Beame*, 433 F. Supp.

1297, 1309 (S.D.N.Y. 1977) (enjoining police commissioner from enforcing the obscenity laws in bad faith); *Manti v. N.Y.C. Transit Auth.*, 121 Misc.2d 824 (S.Ct. 1983). It is apparent that Defendant may not unconstitutionally enforce the 10:00 p.m. restriction.

Even had Plaintiff demonstrated that injunctive relief is necessary, I would deny such relief on the basis on Plaintiff's unclean hands. The maxim of unclean hands "'is a self-imposed ordinance that closes the doors of a court of equity to one tainted with an inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of Defendant.'" *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 752 (9th Cir. 1991), *quoting Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945). It appears that the unclean hands doctrine is available in cases involving constitutional rights, although its use should be limited because of the importance of the rights involved. *Shondell v. McDermott*, 775 F.2d 859, 869-70 (7th Cir. 1985). *Cf. EEOC v. Recruit U.S.A., Inc*, 939 F.2d 746, 753 (9th Cir. 1991) ("unclean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest").

To some extent, all plaintiffs in selective enforcement cases have unclean hands insofar as they have violated valid laws. In this case, however, Plaintiff did more than violate the 10:00 p.m. restriction on opening day. Plaintiff violated this admittedly valid restriction daily from May to the late summer of 1993. The Diamond Club then complied with the restriction for a few months, only to resume opening before 10:00 p.m. in December of 1993 or January of 1994 after operating within the restriction became financially untenable. (Tr. 84) The financial pressures brought to bear on the Diamond Club by compliance with a valid restriction do not excuse the Diamond Club's noncompliance nor does the fact that the Village refrain from enforcing the restriction because of pending litigation.

Plaintiff also requested in its post trial brief that I retain jurisdiction in order to ensure that future enforcement efforts by the Village are not improperly motivated. Given that I have declined to issue injunctive relief, continued monitoring by the Court is unnecessary.

The record in this case makes it clear that Defendant, through the actions of its then-Mayor, enforced the 10:00 p.m. restriction from the time the Diamond Club opened through the summer of 1993 in order to inhibit or punish the exercise of protected speech. However, Plaintiffs have failed, in my opinion, to demonstrate the need for injunctive relief based on events that occurred several years ago under the auspices of different town officials. The Village is entitled to enforce the 10:00 p.m. restriction against the Diamond Club as long as they are not motivated by an impermissible intent.

SO ORDERED

Dated: January 23, 1998
White Plains, New York

/s/

MARK D. FOX
UNITED STATES MAGISTRATE JUDGE

Copies of this decision have been mailed to the following:

The Honorable Barrington D. Parker, U.S.D.J.

GERALD PADIAN, ESQ.
TASHJIAN & PADIAN
206 East 63rd St.
New York, NY 10021

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

LATRIESTE RESTAURANT AND CABARET, INC., doing business as The Diamond Club,

Plaintiff-Appellant,

– against –

VILLAGE OF PORT CHESTER; Domenick Tamarro; James Savage; Christine Korff; Michael Antaki; Thomas Ceruzzi; Janusz Richards; Zoning Board of the Village of Port Chester; John Branca; Anthony Fontana; John Belfatto; and Carl Verrastro,

Defendants-Appellees.

No. 2495, Docket No. 94-7479.

Argued Aug. 8, 1994.

Decided Nov. 21, 1994.

Gerald Padian, New York City (Tashjian & Padian), for plaintiff-appellant.

George O'Hanlon, Port Chester (Aldo Vitagliano, Corp. Counsel), for defendants-appellees.

Before WINTER and LEVAL, Circuit Judges, SKRETNY, District Judge.*

LEVAL, Circuit Judge:

* The Honorable William M. Skretny, United States District Judge for the Western District of New York, sitting by designation.

This is an appeal from a grant of summary judgment in favor of the defendants in the United States District Court for the Southern District of New York, Charles L. Brieant, *Judge*. LaTrieste Restaurant and Cabaret, Inc., now doing business as "The Diamond Club," brought the action under 42 U.S.C. § 1983 to enjoin the Village of Port Chester, its mayor, police chief, and several other village officials, from enforcing a variety of laws and ordinances against it. LaTrieste alleged in its complaint that the defendants were enforcing these laws, and particularly a zoning classification that forbade it from operating as a cabaret, selectively and unconstitutionally, in order to prevent plaintiff from exercising its First Amendment right to have topless dancing on its premises.

BACKGROUND

Port Chester's zoning ordinance prohibited the operation of a cabaret in the zone encompassing LaTrieste's site. In December 1989, the Port Chester Zoning Board of Appeals granted to Citrone Development Corporation, the previous occupant of the site, a use variance which permitted it to operate a cabaret—that is, to feature dancing and live entertainment—on its premises after its dinner hour ended. Under the terms of the variance, the "cabaret hours [were] to start no earlier than 10 p.m."

In February 1992, LaTrieste entered into a lease for the same property. From May 1992 until May 1993, LaTrieste operated a dinner/cabaret format on the premises. LaTrieste submitted undisputed evidence that during this period it openly operated as a cabaret prior to 10 p.m., with the full knowledge of village officials, and without the village ever seeking to enforce the restriction.[1] Judge Brieant found it undisputed that during this period "[d]efendants knew LaTrieste was operating in violation [of the 10 p.m. restriction], but did nothing." (JA159) Because the Italian restaurant/cabaret format turned out to be financially unsustainable, LaTrieste switched to a sports bar/topless cabaret format in May 1993. LaTrieste alleges that when it began featuring topless entertainment, the village began a pattern of harassment designed to prevent LaTrieste from doing so. The harassment included summonses, arrests, fines, the sudden enforcement of a variety of ordinances and regulations, the issuance of numerous notices of violation, and a refusal to act on LaTrieste's applications for permits.[2]

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[1] LaTrieste supports this claim by noting that it regularly advertised start times prior to 10 p.m. in local newspapers, and that members of the Port Chester Police Department regularly inspected the premises prior to 10 p.m. while live cabaret entertainment was taking place.

[2] LaTrieste alleges, *inter alia*, that the defendants ordered it to remove signs that were the same size as signs they replaced and had never before been noticed as violations; that the Village simply never responded to its

In May 1993, the village sent LaTrieste notice that it was violating the 10 p.m. requirement of its variance, and that it must cease operating before 10 p.m. or face the revocation of its certificate of occupancy.

LaTrieste then petitioned the Zoning Board of Appeals to lift the 10 p.m. restriction on the grounds that its operation as a cabaret prior to 10 p.m. would not cause traffic congestion; a public hearing was held on the issue on May 25, 1993. Many Port Chester residents, including the mayor, spoke out against topless dancing at the meeting and urged the board to deny the request for a waiver. The board held that the time to appeal the restriction had expired thirty days after its issuance in 1989, and denied the request to lift the condition.

In September 1993, LaTrieste commenced a proceeding in New York State Supreme Court against the village's Zoning Board under Article 78 of the Civil Practice Law and Rules. LaTrieste's petition sought to vacate the zoning board's decision and to require it to lift the 10 p.m. restriction. Justice Lange held that because LaTrieste knew or should have known of the conditions of the variance when it leased the property, any hardship was self-created; he denied the petition. (JA58).

On January 14, 1994 and on February 16, 1994, LaTrieste received letters from the Port Chester police department stating that LaTrieste's certificate of occupancy would be revoked if it did not cease operating before 10 p.m.

On January 18, 1994, LaTrieste commenced this action. The complaint alleges that village officials, by a campaign of harassment intended to put LaTrieste out of business, are denying it equal protection of the laws and interfering with its First Amendment rights; it seeks an injunction barring the village from revoking its certificate of occupancy by reason

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request to build a stage on the premises; and that it has been subjected to a persistent pattern of police harassment since switching over to the topless format.

of violation of the 10 p.m. restriction, and from unlawfully interfering with LaTrieste's right to allow topless dancing. The district court granted the defendants' motion for summary judgment, finding that LaTrieste was "collaterally precluded from once again litigating the same issue or fact [as previously litigated in the Article 78 proceeding], even if that subsequent litigation is based upon a different claim or legal theory." Because we agree with the plaintiffs that they have raised colorable issues of fact, and that the instant lawsuit is not barred by the Article 78 adjudication, we reverse the grant of summary judgment.

DISCUSSION

It is well-settled that summary judgment may be granted only if there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). On summary judgment, all facts and inferences therefrom are to be construed in favor of the party opposing the motion, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), and appellate review is *de novo*, *Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994).

LaTrieste's principal claim in the federal action is that the village officials have selectively enforced the laws in an attempt to prevent LaTrieste's exercise of protected expression by exhibiting topless dancing. Judge Brieant granted summary judgment for two reasons: First, that the right and duty of the village to enforce its zoning restrictions is not lost through continued prior failure to enforce (JA165); second, that LaTrieste was barred from litigating the question because of its earlier suit under Article 78 (JA164)

We agree with Judge Brieant that principles of laches or estoppel do not bar a municipality from enforcing ordinances that have been allowed to lie fallow. *City of Yonkers v. Rentways, Inc.*, 304 N.Y. 499, 505, 109 N.E.2d 597 (1952); *New York State Medical Transporters Assoc. v. Perales*, 77 N.Y.2d 126, 130 564 N.Y.S.2d 1007, 1010, 566 N.E.2d 134, 137 (1990). But that fails to address the heart of LaTrieste's claim, which is not only that the village previously failed to enforce the restrictions, but also that is is now enforcing them selectively, discriminatorily, and for an unconstitutional motive of suppressing free expression. A claim of selective enforcement rests on different principles from laches. Where a town enforces a previously dormant zoning regulation against only those of a certain race, religion, or political affiliation, it is the constitutional principle of equal protection that is violated (regardless whether the doctrine of laches is applicable). Although selective enforcement is a "murky

corner of equal protection law in which there are surprisingly few cases," *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir.1980), *cert. denied*, 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981), we have ruled that a claim of selective enforcement may lie in a situation such as the one presented here. In *LeClair*, for example, we wrote that a violation of equal protection for selective enforcement would arise if:

> (1) the person, compared with others similarly situated, was selectively treated; and
>
> (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

Id. at 609-10. *See also 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 416 N.Y.S.2d 219, 389 N.E.2d 815 (1979); *cf. Brady v. Town of Colchester*, 863 F.2d 205, 216-17 (2d Cir.1988).

LaTrieste's proofs met the standard of *LeClair*. As to selective treatment, the appellees contend that because the use variance and restriction are specific to the appellant's premises and govern no other in the village, there can be no claim of selective enforcement. This argument is mistaken. While it may be true that there are no *other* covered establishments, the comparison of the town's enforcement of the 10 p.m. restriction against the same premises prior to the start of topless dancing with its enforcement afterwards, can provide an adequate basis of comparison. The village failed to enforce the 10 p.m. restriction against a restaurant that did not exhibit topless dancing and, very shortly thereafter, did enforce the restriction against a restaurant that did exhibit topless dancing. *Cf. 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d at 696-97, 416 N.Y.S.2d at 225-26, 389 N.E.2d at 820-21 (highly suspicious that adult-bookstore's partial sprinklerization plan had been approved for two years and was only revoked when antipornography drive commenced).

LaTrieste has unquestionably raised a triable question of fact on this issue. It appears to be undisputed, and Judge Brieant specifically found, that the village never enforced the 10 p.m. restriction prior to the institution of topless dancing.

The evidence clearly raises a question of material fact that the eventual enforcement was intended to inhibit the exercise of a constitutional right. LaTrieste submitted substantial uncontroverted evidence that the village's various enforcement tactics were adopted because it did not want a topless bar operating within its borders. As examples, Port Chester's Police Chief Verrastro told LaTrieste's principals that "I do not want a topless club in my town," and that such an establishment would "not be permitted in Port Chester." (JA76) The Mayor, John Branca, participated in picketing demonstrations against the topless club and testified at the hearing of the zoning board that LaTrieste's application for a waiver should be denied because the establishment is near a residential neighborhood and the "use of this establishment is not the correct use in the Village of Port Chester." (JA78, 101) A building and fire department inspector conducting an inspection, when asked why the village had begun to impose the 10 p.m. restriction, responded that the village did not want a topless establishment. (JA82, 94)

The Supreme Court has held that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991). The New York Court of Appeals has held that topless dancing is protected under the New York Constitution, *Bellanca v. New York State Liquor Auth.*, 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1981), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982). LaTrieste has raised a question of fact as to whether "selective treatment was based on impermissible considerations such as . . . [an] intent to inhibit or punish the exercise of constitutional rights," *LeClair*, 627 F.2d at 609.

Judge Brieant's second ruling was that because the variance at issue had already been validated in LaTrieste's Article 78 proceeding, LaTrieste was precluded from bringing this suit.

In our view, Latrieste's present action is so substantially different from its prior suit under Article 78 that it is not precluded. The present suit rests on different facts; it is directed against different defendants, proceeds under a different theory of law, and seeks different relief. Notwithstanding that the action has certain points in common with the earlier suit, including that both sought to free LaTrieste from the 10 p.m. restriction, it is not barred.

The Article 78 proceeding was brought only against Port Chester's zoning board, and sought only to reverse its decision on Latrieste's application to eliminate the 10 p.m. restriction from its variance. The present suit is brought against several other town officials—the mayor, the police chief, and two building inspectors who were not named in the earlier suit—and complains that they engaged in a pattern of harassment and discriminatory enforcement of numerous laws. These allegations were not a part of the earlier suit. Also, to some extent this action depends on facts that had not yet occurred when the evidence was submitted in the prior suit.

It is true that the complaint does once again name the members of the zoning board as defendants. Under the rule of *issue preclusion, see Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414-15, 66 L.Ed.2d 308 (1980), LaTrieste is precluded from relitigating the issue of the lawfulness of the zoning board's refusal to lift the restriction. However, Latrieste's complaint does not seek to do so. Indeed, it seeks no relief against the zoning board.

Under *claim preclusion*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id.* The question is whether LaTrieste "could" have

raised in the earlier state action all of the claims now before us.[3] As we recently noted in another case involving New York law, "Our analysis is governed by New York State law, which has adopted a transactional approach to res judicata, barring a later claim *arising out of the same factual grouping* as an earlier litigated claim even if the later claim is based on different legal theories or seeks dissimilar or additional relief. *See, e.g., Smith v. Russell Sage College*, 54 N.Y.2d 185, 445 N.Y.S.2d 68, 71, 429 N.E.2d 746 [749] (1981)." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994) (emphasis added).

The alleged harassment of LaTrieste and the alleged discriminatory enforcement of various laws, including the town's zoning classification, do not arise from the same set of facts, and do not even involve the same actors, as the zoning board's rejection of LaTrieste's petition to alter the terms of its variance. The new suit depends on allegations of summonses, violations, fines, arrests, and selective discriminatory treatment that were not involved in the Article 78 allegations, and that were committed by persons who were not parties to the Article 78 proceeding. LaTrieste could not have raised these claims in its Article 78 proceeding without adding additional parties and transforming the focus of its factual allegations. Accordingly, we conclude that the assertion of these claims in this action is not barred.[4]

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[3] Under the Constitution's Full Faith and Credit Clause, *see* U.S. Const. Art. IV § 1, federal courts must accord state court judgments the same preclusive effect as other courts within that state." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994).

[4] Plaintiff had brought another action in the New York State courts to bar picketers from blocking access to its premises. That action does not preclude this one for the same kinds of reasons given above. Although the mayor was a party to both actions, he was named in the earlier suit by reason of his participation in the picketing, not because of his conduct as a government official. Neither the police chief nor the building inspectors were named in the previous action, and furthermore, the subject matter of the action, obstructive picketing by town residents, does not arise from the same "factual grouping" as the alleged selective and discriminatory enforcement of laws by town officials involved in this action.

CONCLUSION

Because LaTrieste has raised material issues of fact as to whether the defendants are impermissibly engaging in harassment and selective discriminatory enforcement of the laws, designed to prevent LaTrieste's exercise of First Amendment rights, and because this action is not barred by LaTrieste's prior action against the Port Chester Zoning Board of Appeals, summary judgment was not proper. We therefore vacate the judgment entered in the district court and remand for further proceedings.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LaTrieste Restaurant and Cabaret, Inc.
d/b/a The Diamond Club,

Plaintiff,

– against –

Village of Port Chester; Domenick Tammaro, James Savage, Christine Korff, Michael Antaki, Thomas Ceruzzi, and Janusz Richards, constituting the Zoning Board of the Village of Port Chester; John Branca; Anthony Fontana; John Belfatto and Carl Verrastro

Defendant.

Memorandum and Order

94 Civ. 0252 (CLB)

U.S. DISTRICT COURT
April 29, 1994
S.D. OF N.Y.

Brieant, J.

All defendants move for dismissal of the Complaint in this federal civil rights action for failure to state a claim upon which relief can be granted or in the alternative for summary judgment pursuant to Rule 56 of the Fed. R. Civ. P. Treated as a motion for summary judgment, the motion is granted.

Plaintiff LaTrieste Restaurant & Cabaret, Inc d/b/a The Diamond Club ("LaTrieste") alleges selective, discriminatory, and improprer application of the laws and codes of the Village of Port Chester in violation of the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. Plaintiff seeks a permanent injunction enjoining plaintiffs from revoking plaintiff's certificate of occupancy for violating the 10:00 p.m. restriction on its hours of business, contained in its land use variance and from otherwise interfering with the operation of plaintiff's restaurant.

LaTrieste is a New York Corporation with its principal place of business in the incorporated Village of Port Chester, Westchester County ("The Village"). Defendants Domenick Tammaro, James Savage, Christine Korff, Michael Antaki, Thomas Ceruzzi, and Janusz Richards are members of the Zoning Board of Appeals of the Village. Defendant John Branca is the Mayor of Port Chester. Defendants Anthony Fontana and John Belfatto are Building Inspectors for the Village employed by the Village. Defendant Carl Verrastro is the Chief of Police.

On February 10, 1992 LaTrieste entered into a lease of storefront number one at 140 Midland Avenue, Port Chester, New York with the intention of operating an Italian restaurant/nightclub. A Zoning Board of Appeals Hearing on December 18, 1989 had granted the previous tenant's application for a variance to permit dancing and live entertainment after its dinner hour was concluded at 10:00 p.m. LaTrieste maintains that it leased the location under the then existing Certificate of Occupancy because, to the best of its knowledge, the time limitations on dancing and entertainment prior to 10 p.m. had never been enforced by the Village. While LaTrieste received a cabaret license unrestricted as to time, the certificate of occupancy did not

permit the music, dancing, and entertainment, which are essential to a cabaret to begin until after 10:00 p.m.[1]

From its opening in May, 1992 through May, 1993 the restriction was not enforced, and LaTrieste provided dancing and live entertainment before 10:00 p.m. Defendants knew LaTrieste was operating in violation, but did nothing.

In May, 1993 LaTrieste changed from a traditional dinner/nightclub to a sports bar/topless cabaret. Plaintiff executed a new lease with its landlord permitting it to have topless dancing on the premises. Plaintiff alleges its principals spoke with Chief Verrastro, who stated that he did not want and would not permit a topless cabaret in Port Chester. Allegedly, Chief Verrastro, the Village and its officials set out to drive plaintiff out of business.

Defendants ordered plaintiff to remove signs which were the same size and in the same place as previous signs, now claiming they violated Village Building Codes. Plaintiff alleges defendant Belfatto, when asked why the Village was suddenly enforcing the Zoning restriction, said that the Village did not want a topless establishment. The premises were then inspected by the New York State Liquor Authority. Plaintiff claims it had never been subject to such an inspection before becoming a topless bar.

Plaintiff also alleges a pattern of police harassment. Thus, Mr. Tummolo, LaTrieste's manager, was arrested for verbally responding to protestors at the site; however, these charges were later dismissed. Mr. Saccomano, an officer and shareholder in LaTrieste was arrested for refusing to move a barricade and charged with obstruction of governmental administration, which was reduced to disorderly conduct, of which he was convicted on his plea. Mr. Sorrano, a LaTrieste employee, alleges he was threatened by Port Chester Police

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[1] A cabaret is a "restaurant serving liquor and providing entertainment, usually singing and dancing." *Webster's Third New International Dictionary*, Springfield, Mass. 1993.

Lieutenant Kosifas without reason or provocation, and was not permitted to file a complaint.

By letter dated May 14, 1993, Plaintiff was notified by Building Inspector Fontana that plaintiff was in violation of its Certificate of Occupancy and was ordered to cease entertainment before 10:00 p.m. or it would have its CO revoked. On May 25, 1993, LaTrieste requested the Zoning Board of Appeals to lift the 10:00 p.m. restriction. On June 17, 1993, a public hearing was held. Officials and members of the public spoke at the hearing about the immorality of a topless cabaret but did not discuss the increase in traffic congestion upon which the time limitation was initially founded.

Plaintiff contends the restriction is unnecessary, causes it undue hardship, and is not based upon a legitimate reason. Defendants contend that the Zoning Board of Appeals was required to decline an amended variance because the Village Law does not permit a variance where the condition of hardship is self-created, in this case by leasing the premises knowing the time limitations of the variance previously granted.

On August 19, 1993, Plaintiff brought an Article 78 proceeding in Supreme Court, Westchester County, seeking review of the Zoning Board's decision. Acing Supreme Court Justice Kenneth H. Lange denied all relief, concluding that the hardship was self-created. The final order in that Article 78 proceeding is claim preclusive as to the validity of the zoning regulations applicable to these premises, and is entitled to full faith credit in this Court.

On June 21, 1993 LaTrieste applied for a new cabaret license which would not be subject to the 10:00 restriction. The Village ignored the application and twice extended its village wide moratorium on other topless and bottomless establishments (the moratorium expires on May 3, 1994). On May 28, 1993 the Executive Department of the Division of Alcohol Beverage Control wrote LaTrieste a letter warning

that it had received notice fom the Port Chester police department that plaintiff was maintining signs without a permit and operating a cabaret in violation of the Port Chester Zoning laws.

In time, members of the public began demonstrating, first on the sidewalk near the restaurant and then in the parking lot. Protestors included the Mayor and Members of the Zoning Board. Plaintiff asked the police to remove the demonstrators from the parking lot. The police said plaintiff should get a Court Order. Plaintiff applied to the Supreme Court, Westchester County, for a restraining order to move the demonstrators from the parking lot and back on to the sidewalk. Supreme Court Justice Harold L. Wood restrained the demonstrators from blocking patrons' access to the restaurant and from using bull horns, but permitted them to continue picketing in the parking lot. On reargument, Justice Wood adhered to his decision. This order was affirmed by the Appellate Division, Second Judicial Department, on January 27, 1994, and is claim preclusive since any First Amendment issues could have been raised therein.

On January 14, 1994 LaTrieste was served by the Port Chester Police Department with a letter from the Building Department stating that LaTrieste must cease operating before 10:00 p.m. or the Certificate of Occupancy would be revoked.

Thereafter, plaintiff brought this action alleging selective, discriminatory, and improperly applied enforcement of the laws and codes of the Village, in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiff requests injunctive relief enjoining defendants from revoking plaintiff CO for violating the 10:00 p.m. restriction, and from otherwise interfering with plaintiff's right to have topless dancing on its premises.

On February 18, 1994, plaintiffs applied to this Court for interim injunctive relief. The parties were able to agree to maintain the status quo, while defendants moved to dismiss

for failure to state a claim or in the alternative for summary judgment, contending that no question of material fact exists and that they are entitled to judgment as a matter of law.

Summary judgment may be granted only "if the [papers] show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242 (1986) The moving party bears the burden of establishing the absence of any genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All factual inferences and ambiguities "must be viewed in the light most favorable to the party opposing the motion" *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Deibold, Inc.*, 369 U.S. 654, 655 (1962)). However, an opposing party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 256. In order to defeat a summary judgment motion, the non-moving party "need only present evidence from which a jury might return a verdict in [its] favor." *Anderson* at 257.

Once a final judgment on the merits has been rendered resolving a particular issue or a disputed fact, the parties are collaterally precluded from once again litigating the same issue or fact, even if that subsequent litigation is based upon a different claim or legal theory. The issue as to the validity of the 10:00 p.m. land use limitation and whether plaintiff may be relieved from it was fully adjudicated in the Article 78 proceeding before Acting Supreme Court Justice Kenneth H. Lange previously mentioned. That Court held plaintiffs had not proven the Zoning Board of Appeals' action to be arbitrary, illegal or an abuse of discretion, and concluded as a matter of law that plaintiff knew or should have known of the zoning restrictions on the property at the time they entered into the lease, so the hardship, if any, was self created.

This Court finds it troubling that the Village suddenly decided to enforce the valid limitation on the hours of operation, following LaTrieste's change from a traditional dinner/nightclub to a sports bar/topless cabaret. However, this Court finds no reported caselaw holding that the right and duty of a Village to enforce zoning ordinances or land use regulations are lost through continuing neglect, and none is cited to us.

This Court does not perceive the revocation of a Certificate of Occupancy to be the proper penalty for a violation of the terms of a variance. A Certificate of Occupancy is a property right which can not be deprived without due process. The Village should enforce the violation through the ordinary zoning procedures found in its code. However, a threat to do so is not actionable, and any purported revocation would be void as a matter of state law.

While topless dancing may well be protected under the First Amendment, a point we need not decide here, there is no vested right to continued non-enforcement of a land use restriction which has been adjudged to be valid, and such a right may not be perfected simply by bringing in topless dancers.

Summary judgment is granted in favor of the defendants.

The Clerk shall enter final judgment. No costs.

So Ordered.

Dated: White Plains, New York
April 29, 1994

/s/ Charles Brieant

Charles L. Brieant, U.S.D.J.

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Supreme Co

October Term, 1999

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LaTRIESTE RESTAURANT & CABARET, INC. d/b/a THE DIAMOND CLUB,

Petitioner,

- against -

VILLAGE OF PORT CHESTER, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether the Second Circuit properly reversed the limited declaratory judgment that the Village selectively enforced the 10:00 p.m. restriction from May 1993 until the late summer of 1993 where plaintiff failed to demonstrate that it was selectively treated as compared to similarly situated entities?

Whether the Second Circuit properly upheld the denial of petitioner's application for attorney's fees pursuant to 42 U.S.C. sec. 1988 where plaintiff was not a "prevailing party"?

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, rendered by Magistrate Judge Fox on July 22, 1998, is not officially reported, but is reported in the appendix hereto, (1a) infra.

STATEMENT OF THE CASE

A. The Bench Trial

At the bench trial held before Hon. Magistrate Mark D. Fox, the central issue was whether the Village had selectively enforced the 10:00 p.m. time restriction in violation of The Diamond Club's Equal Protection Rights.[1]

Magistrate Judge Fox, as the trier-of-fact, determined that "The Diamond Club's proof at trial was not sufficient to establish by a preponderance of the evidence that the Village had knowledge of violations of the 10:00 p.m. restriction by... prior occupants of the premises," i.e., those entities "similarly situated", (App. 14). Petitioner did not challenge that finding on appeal.

Even though Judge Fox found that the Town had no knowledge of prior violations by those entities "similarly situated" he still, determined that the Village, through its

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[1] Petitioner advised Magistrate Fox at trial that he was not claiming that any other conduct, such as sign violations, fire inspections, and reporting of violations to the State Liquor Authority constituted selective enforcement, (App.2). In addition, Magistrate Fox determined that the Village preferred reasonable explanations for its conduct and that plaintiff failed to provide sufficient evidence to demonstrate that any such conduct was done with intent to inhibit or punish protected speech, (App.22).

Mayor at the time, selectively enforced the 10:00 p.m. restriction from May, 1993 to the late summer of 1993. (App. 24). Judge Fox further found that petitioner had failed to demonstrate an intent to discriminate on the part of any other Village official, besides the Mayor, or any selective enforcement of the 10:00 p.m. restriction by the Village after the late summer of 1993, (App. 22,24). Petitioner did not challenge either of these findings on appeal.

After the decision was rendered by the Magistrate Judge, by Memorandum Order dated July 22, 1998, the Court denied that application. Petitioner applied to the District Court for an award of attorney's fees pursuant to 42 U.S.C. sec. 1988. That application was denied in its entirety based on petitioner not being a "prevailing party" as required under sec. 1988, (App. 49).

B. The Appeals

Respondents appealed from that portion of the Decision which found that the Village engaged in selective enforcement from the period of May 1993 to the late summer of 1993.

Petitioner cross-appealed solely from the July 22, 1998 Memorandum Order which denied petitioner's application for attorney's fees.

C. The Second Circuit Ruling

On Appeal from the bench trial, the district court's findings of fact were reviewed by the Second Circuit for clear error and its conclusions of law were reviewed de novo. See *Lopresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997) (App. 7).

By Decision dated August 11, 1999 the Second Circuit reversed the limited declaratory judgment in favor of petitioner and affirmed the denial of petitioner's application for attorney's fees. (App. 1).

In reviewing the District Court's finding of selective enforcement, the Second Circuit followed the well-established test in the Second Circuit. That test was set forth as follows (App. 7):

> "In order to establish a violation of equal protection based on selective enforcement, the plaintiff must ordinarily show (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as ... intent to inhibit or punish the exercise of constitutional rights." *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 15-17 (2d Cir. 1999) (quotations and citations omitted), (App. 7).

In applying this test, the Second Circuit concluded that petitioner failed to establish the first element of its selective enforcement claim that the Village selectively treated the Diamond Club when compared to "similarly situated" establishments, (App. 8).

In reaching this conclusion, the Court made clear that under the test in the Second Circuit, knowledge of other violations is not required in every case. (App. 8). However, the Court determined <u>that under the specific facts of this case</u>, petitioner failed to provide proof supporting any alternative theory of selective treatment wherein knowledge is not required. (App. 8). As stated by the Court:

> A petitioner generally must satisfy both elements to establish a claim of selective enforcement, see *Zahra v. Town of Southold,* 48 F.3d 674, 684 (2d Cir. 1995), and knowledge is ordinarily required to establish the first element. We do not hold that knowledge will be required in every case. It is conceivable that selective treatment could be shown where, for example, proof was offered that a municipality did not know of prior violations because it adhered to a see-no-evil policy of not enforcing an ordinance, and then abandoned that policy with respect to a violator engaged in protected activity. In this case, however, LaTrieste has not explicitly called our attention to proof supporting this, or any other such alternative theory of selective treatment. Accordingly, any such alternative arguments are waived. (emphasis added). See *Norton v. Sam's Club,* 145 F.3d 114, 177 (2d Cir. 1998), (App. 8).

Based on the unchallenged finding that the Village did not know of any prior violations of the 10:00 p.m. restriction and on petitioner's failure to point to any alternative proof of discriminatory enforcement, the Second Circuit determined that the Magistrate Judge's conclusion that the Village selectively treated similarly situated entities could not stand, (App. 9).

REASON FOR DENYING THE WRIT

No basis for granting the instant petition exists in this case. The Second Circuit's Decision that petitioner failed to make out a selective enforcement claim was based on petitioner's failure to sufficiently support its contention that

it was selectively treated when compared to similarly situated entities.

On appeal, petitioner did not challenge the Magistrate Judge's finding that the Village did not know about other violations of the 10:00 p.m. restriction. Petitioner also failed to point to any alternative proof of discriminatory enforcement. Absent such proof, the Second Circuit properly determined that petitioner failed to establish the first element of its selective enforcement claim - that the Diamond Club was selectively treated when compared to similarly situated establishments.

The Second Circuit's Decision was in no way "novel" or "dubious" as asserted by petitioner. To the contrary, the Decision simply follows the well-settled rule in the Second Circuit, that a petitioner must demonstrate that he was selectively treated compared with others similarly situated in order to establish a violation of equal protection based on selective enforcement. See *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 15-17 (2d Cir. 1999); *Le Clair v. Saunders*, 627 F.2d 606 (2d Cir. 1980). The reversal by the Second Circuit of the finding of selective enforcement was based on petitioner's failure to demonstrate such selective treatment.

By this petition, petitioner is simply attempting to circumvent the Second Circuit's finding that plaintiff failed to prove that it was selectively treated. In so doing, petitioner essentially argues that it does not have to show that it was selectively treated as compared to similarly situated establishments in order to prove selective enforcement in violation of the Equal Protection Clause. This position itself is "dubious" as it flies directly in the face of well-established precedent that requires proof of selective treatment in order for selective enforcement to be proper. As stated by the

Supreme Court and cited by the Second Circuit below "Selective prosecution implies that a selection has taken place." *United States v. Armstrong*, 517 U.S. 456, 469, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). No such selection has been shown here. Petitioner also provides no case law in support of such an alleged "exception" to the well settled rule governing selective enforcement cases.

It is also noted that petitioner never took the position below that a "harassment exception" to a normal "selective enforcement" claim should be found. To the contrary, petitioner's position below, as stated by the Second Circuit, was "that selective treatment is established simply by demonstrating that the zoning restriction was not enforced against the Diamond Club's predecessor's and this, without regard to whether the Village knew about the other violations." (App. 9). Petitioner's position on this petition, that a "harassment exception" should have been found, was not raised below and is argued for the first time to this Court. Since petitioner did not argue a "harassment exception" below, any such argument was waived and should not be considered herein.

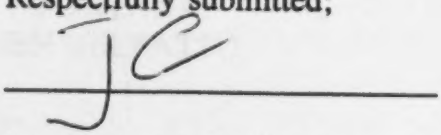
Finally, the petition should be denied because petitioner's claim that the Village orchestrated a series of harassing techniques directed solely at the prospective or ongoing "topless dancing" was found by the Magistrate Judge in his decision, not to have been proven. The Magistrate Judge specifically determined that the Village offered reasonable explanations for most of its conduct and that petitioner failed to provide evidence that the treatment afforded the Diamond Club concerning code violations anomalous, (App. 21-22). Petitioner also failed to demonstrate that the Village Officers who enforced the building code violations acted with discriminatory intent, (App. 23-24). Petitioner did not appeal any of these

findings. There was also no proof at trial concerning the Village allegedly "organizing public picket lines to block the entrance of the Diamond Club" as asserted in the petition. Since petitioner failed to prove its claim that a "series of harassing techniques" was undertaken, its claim that a "harassment exception" should have been created is without merit.

CONCLUSION

FOR THE FOREGOING REASONS, the Petitioner for Writ of Certiorari should be denied.

Respectfully submitted;



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File No. 30-0854

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LATRIESTE RESTAURANT AND
CABARET, INC.,
d/b/a THE DIAMOND CLUB,

Plaintiff,

- against -

MEMORANDUM ORDER
94 CIV 0252 (BDP)(MDF)

THE VILLAGE OF PORT CHESTER,
JOHN BRANCA, ANTHONY FONTANA,
CARL VERRASTRO and JOHN BELFATTO,

Defendants

MARK D. FOX, United States Magistrate Judge

The parties consented to trial before me pursuant to 28 U,S.C. §636(c) on October 17, 1996. After a bench trial, I rendered a decision on January 23, 1998. LaTrieste Restaurant and Cabaret, Inc. ("LaTrieste"), through its attorneys, the law firm of Tashjian & Padian, has applied for attorneys' fees in the amount of $214,761.02.[1] For the reasons that follow, the application for attorneys' fees is denied.

LaTrieste, which operates a topless cabaret called the Diamond Club at 140 Midland Avenue in the Village of Port

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[1] Plaintiff originally requested $267,205.12 in attorneys' fees but, in its reply papers, decreased the amount of the application in response to certain arguments made by Defendant

Chester ("Village"), brought this action pursuant to 42 U.S.C. §1983, alleging that the Village selectively enforced a use restriction on the premises in an attempt to inhibit or punish the exercise of Plaintiff's First Amendment rights. 140 Midland Avenue is located in a commercial zone in which cabaret entertainment is not allowed. A prior occupant of the premises had obtained a special exception allowing cabaret entertainment between 10:00 p m. and 2:00 a.m, and it was the enforcement of this restriction that Plaintiff challenged.

An understanding of the procedural history of this case is necessary to evaluate Plaintiff's claim that it is a prevailing party (who is) entitled to attorneys' fees. LaTrieste commenced this action on January 18, 1994 and sought a temporary restraining order and/or preliminary injunction enjoining the Village from revoking LaTrieste's certificate of occupancy or otherwise interfering with topless dancing at the Diamond Club. The request for temporary relief was resolved by a stipulation that the Village would not attempt to revoke the Diamond Club's certificate of occupancy until the state court decided an Article 78 proceeding brought by LaTrieste challenging the Village's decision not to grant a variance from the 10:00 p.m. restriction. On February 18, 1994, after a decision adverse to LaTrieste had been rendered in the Article 78 proceeding, LaTrieste again requested interim relief enjoining revocation of its certificate of occupancy and interference with topless dancing at the Diamond Club. This matter was also resolved by a stipulation in which the Village agreed not to take action until the Honorable Charles L. Brieant, to whom the case was then assigned, decided the Village's motion for summary judgment. Judge Brieant granted the summary judgment motion on April 29, 1994 and refused to issue a stay pending appeal to the Second Circuit Court of Appeals. The Court of Appeals issued a stay and vacated Judge Brieant's decision on November 11, 1994, LaTrieste Restaurant & Cabaret, Inc

v. Village of Port Chester, 40 F.3d 587 (2d Cir. 1994). The Village then agreed before the Honorable Barrington D. Parker, Jr., to whom the case had been reassigned, to hold its prosecution of LaTrieste in abeyance pending settlement discussions. On March 15, 1996, the Village notified LaTrieste that it would no longer hold the prosecution in abeyance. LaTrieste again sought a temporary restraining order and/or preliminary injunction. On March 29, 1996, Judge Parker denied interim relief to LaTrieste, finding that it had not shown a likelihood of success on the merits. Despite this ruling, the Village apparently took no further action against LaTrieste prior to the completion of testimony in the bench trial.

Judge Parker granted qualified immunity to the individual defendants, thus precluding LaTrieste from claiming punitive damages. Plaintiff then withdrew its claim for damages, leaving only its claims for a declaratory judgment and injunctive relief.

I conducted a bench trial that concluded on November 20, 1997. In my decision of January 23, 1998, I found that prior occupants of 140 Midland Avenue provided cabaret entertainment prior to 10:00 p.m. and that the 10:00 p.m. restriction was unenforced prior to the opening of the Diamond Club. The restriction was enforced for the first time on the Diamond Club's opening night, and the Village thereafter issued LaTrieste several notices of violation for failure to comply with the 10:00 p.m. restriction. I concluded that the attempts to enforce the restriction during the summer of 1993, when the Diamond Club was a source of considerable controversy in the Village, were made with the intent to inhibit or punish the exercise of Plaintiffs First Amendment rights. In doing so, I considered comments made by then Mayor John Branca, which included statements made to constituents that he would do everything legally possible to stop topless dancing in the Village.

I found that LaTrieste had not proven that any Village

officials other than Branca intended to inhibit or punish the exercise of LaTrieste's rights. I also found that LaTrieste failed to prove that attempts by the Village after the summer of 1993 to enforce the restriction were motivated by an intent to inhibit or punish the exercise of Plaintiff's First Amendment rights I determined only that "the Village engaged in unconstitutional selective enforcement from the period of May 1993 to the late summer of 1993 when the Diamond Club began temporarily complying with the 10:00 p.m. restriction."

Plaintiff requested that the Village be enjoined from pursuing both pending administrative proceedings, stemming from a January 1994 notice of violation, to revoke LaTrieste's certificate of occupancy and "quasi-criminal proceedings" pending in village court based on a May 1994 notice of violation. Assuming for the purposes of the decision that I could enjoin such proceedings, I declined to grant injunctive relief for a number of reasons, including the fact that LaTrieste had offered no evidence about the status of either of these proceedings; the fact that Mayor Branca, who was the only Village official proven to have acted with impermissible intent, was not proven to have any connection to these proceedings; and the fact that Plaintiff had failed to prove that the particular citizen complaints that gave rise to these enforcement efforts were motivated by an intent to inhibit or punish Plaintiffs First Amendment rights.

Plaintiff also requested an injunction preventing the Village from engaging in selective enforcement of the 10:00 p.m. restriction. I denied this request because Plaintiff demonstrated no necessity for injunctive relief given that Mayor Branca, the only individual shown to have acted with intent to inhibit or punish Plaintiffs exercise of its constitutional rights, left office in 1995. I also indicated that I would have denied injunctive relief in any event on an unclean hands theory given that Plaintiff had continued up until trial to operate in violation of a restriction that was held

valid in an Article 78 proceeding in January 1995.

Judgment was entered on February 4, 1999 and read in part "that the plaintiff have declaratory judgment declaring that the Village of Port Chester selectively enforced the 10: 00 p.m. zoning restriction against plaintiff in accordance with the January 23, 1998 Decision, from the period of May, 1993 to the late summer of 1993"

In an action claiming a violation of 42 U.S.C. §1983, the Court, in its discretion, may award attorneys' fees to the prevailing party. 42 U.S.C. §1988. Generally speaking, a litigant is a prevailing party under 42 U.S.C. §1988 when he or she has "prevailed on the merits of at least some of his claims." Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (per curiam). Prevailing on the merits requires the receipt of some kind of relief Hewitt v. Helms, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail. ") "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces." Id. at 761.

Whether a declaratory judgment can render a party prevailing depends on the circumstances. In Rhodes v. Stewart, 488 U.S. 1 (1989), the Court reviewed a grant of attorneys' fees in a case in which two plaintiffs obtained a declaratory judgment stating that prison officials had applied incorrect procedural and substantive standards in denying plaintiffs permission to subscribe to a magazine. By the time the district court made this decision, one of the plaintiffs was dead and the other had been paroled. The Court reversed the grant of attorneys' fees, saying that the judgment obviously benefitted neither plaintiff and observing that, "A declaratory judgment ... is no different from any other judgment. It will constitute relief, for purposes of §1988 if, and only if, it affects the behavior of the defendant toward the plaintiff."

Id. at 4

The formulation of the prevailing party test upon which both parties rely is found in Farrar v. Hobby, 506 U.S. 103, 111-12 (1992). In that case, which addressed an award of nominal damages, the Court held that "A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." See also Texas State Teachers Ass'n v. Garland Independent Sch. Dist., 489 U.S. 782 (1989); Coalition for a Liveable West Side, Inc. v. N.Y.C. Dep't Env. Prot., No. 92 CIV 9011, 1998 WL 299938 (S.D.N.Y. June 9, 1998).

Plaintiff takes the position that the legal relationship between the parties has been materially altered by my determination that the Village selectively enforced the 10:00 p.m. restriction and by my statement that the Village is not entitled to enforce the restriction with the intent to inhibit or punish the exercise of Plaintiffs First Amendment rights.[2]

This statement is a simple summary of governing law rather than an edict. Neither this statement nor the declaratory judgment awarded Plaintiff materially alters the parties' legal relationship. The Village was not entitled to enforce the 10:00 p.m. restriction with an intent to inhibit or punish the exercise of First Amendment rights before, during, or after this litigation. Both parties find themselves in the same legal position they occupied prior to

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[2] Plaintiff also claims that its legal relationship to the Village has been materially altered because, in future actions, the burden will be on the Village to prove that its enforcement of the restriction is not motivated by a desire to inhibit or punish protected speech. Although Plaintiff made this argument in its post-trial brief, I did not decide this issue. Putting aside the fact that I have reservations about the legal merit of this argument, it was neither necessary nor desirable for me to decide the burden of proof in potential future litigation that might well take place before another court.

commencement of this case. Plaintiff failed to obtain injunctive relief that would have materially altered the parties' legal relationship. See LeBlanc-Sternberg v. Fletcher,---- F.3d ----, 1998 WL 248641 (S.D.N.Y May 13, 1998).

I also note that the declaratory judgment in this case was narrow. Plaintiff proved only that the Village engaged in selective enforcement during the summer of 1993. I held that Plaintiff had not proven that enforcement efforts in 1994 were unconstitutionally motivated. Thus the declaratory judgment did not apply to pending enforcement attempts. There was no indication that unconstitutional conduct was likely to recur. See LaGrange Trading Co. v. Broussard, No. A 90-2306, 1993 WL 188672 (E.D.La. May 25, 1993) (adult bookstore not entitled to attorneys' fees when Court held that amendment to zoning ordinance was constitutional with the exception of a special permit requirement. The city was entitled to, and did, force Plaintiff to relocate under the valid provisions of the law.) Cf. Putnan v. Davies, 960 F. Supp. 1268 (S.D. Ohio 1997), affd ---- F.3d ----- 1998 WL 344075 (6th Cir. May 26, 1998) (awarding attorneys' fees when plaintiffs obtained declaratory judgment alone. The Court declined to issue a permanent injunction solely because it assumed that law enforcement personnel would not attempt to enforce a statute that had been held unconstitutional).[3]

Plaintiff also argues that I should at least award it attorneys' fees for obtaining settlements of its repeated preliminary injunction applications. These agreements were in effect between January 1994 and March 1996. LaTrieste

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[3] Had Plaintiff not withdrawn its claim for damages, it likely would have been entitled to nominal damages. Under such circumstances, the only reasonable fee would have been no fee. Farrar v. Hobby, 506 U.S. 103 (1992).

correctly observes that attorneys' fees are available for obtaining a preliminary injunction under certain circumstances. The question of whether the settlement of a request for a preliminary injunction entitles a party to attorneys' fees is a different question altogether.

Obtaining temporary relief entities a party to attorneys' fees under 42 U.S.C. §1988 only when the decision to grant such relief is made on the merits. See Haley v. Pataki, 106 F.3d 478 (2d Cir. 1997). Interim relief that serves only to maintain the status quo, such as a temporary restraining order, does not render a litigant a prevailing party. Smith v. Thomas, 687 F.2d 113 (5th Cir. 1982). This principle applies even when the delay occasioned by the temporary relief leads to a desirable outcome for plaintiff LaRouche v. Kezer, 20 F.3d 68 (2d Cir. 1994) (plaintiffs granted injunction pending appeal to the Second Circuit Court of Appeals were not prevailing parties despite the fact that during the pendency of the appeal plaintiffs were, as they had demanded, placed on the ballot).[4]

The stipulations entered into by the Village plainly do not amount to a determination on the merits. In fact, when the Village would no longer stipulate to hold the proceedings in abeyance, Judge Parker denied LaTrieste's preliminary

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[4] The instant case differs from the usual application for attorneys' fees based on obtaining interim relief insofar as here Plaintiff ultimately obtained a declaratory judgment. However, the events that formed the basis for the declaratory judgment were not proven by LaTrieste to be related to the actions that LaTrieste sought to enjoin from 1994 to 1996. As I have observed, LaTrieste failed to prove that intent to inhibit or punish the exercise of First Amendment rights animated the Village's enforcement attempts after the summer of 1993. I reject the theory that plaintiff should be awarded attorney's fees because it obtained two types of relief - a declaratory judgment and a temporary cessation of enforcement efforts-either of which standing alone would be insufficient to render it a prevailing party.

injunction request on the grounds that it had not shown a likelihood of success on the merits.

I have considered and rejected the argument that Plaintiff can recover attorneys' fees for the settlements of its requests for temporary relief under a catalyst theory. Attorneys' fees are available under a catalyst theory when a defendant changes his or her conduct under pressure of a lawsuit. Marbley v. Bane, 57 F.3d 224, 234 (2d Cir. 1995). Specifically, attorneys' fees are warranted when there is a causal connection between the lawsuit and voluntary relief provided by the defendant, provided that the defendant acted as it did because of the threat of victory rather than the threat of nuisance and expense. Id. This theory is commonly employed when a lawsuit induces a defendant to alter regulations that were the subject of the litigation. Plaintiff has pointed to no case in which attorneys' fees have been granted because a plaintiff obtained a settlement that promised an explicitly temporary cessation of enforcement efforts. In the absence of precedent for such a use for the catalyst theory, I decline to apply it in this case.[5]

As the foregoing makes clear, the procedural history of this case is unique. Furthermore, the determination as to whether Plaintiff is a prevailing party is complicated by the nature of a selective enforcement action, which by definition involves a valid regulation. Here, Plaintiff has acknowledged that the Village is entitled to enforce the 10:00 p.m. restriction unless it does so with the intent to inhibit or punish the exercise of constitutional rights. Plaintiff has

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[5] I also note that the Second Circuit Court of Appeals' reversal of Judge Brieant's grant of summary judgment does not render Plaintiff a prevailing party. A denial of summary judgment obviously indicates only that genuine issues of material fact exist and does not determine the merits of a case. See Hanrahan v. Hampton, 446 U.S. 754 (1980) (per curiam) (reversal of directed verdict does not make one a prevailing party)

been aware of this principle since the state court decided against LaTrieste in the Article 79 proceeding in 1995 and, in fact, Plaintiff represented in writing prior to the opening of the Diamond Club that it would abide by the 10:00 p.m. restriction. Vincent Sorrano, one of LaTrieste's principals, acknowledged at trial that after a short period of compliance with the restriction in 1993 the Diamond Club resumed operating before 10:00 p.m. because it could not survive financially if it did not do so. At the time of trial, the Diamond Club was opening at noon Monday through Friday and at 5:00 p.m. on weekends. The fact is that Plaintiff erred in locating its cabaret in a zone that prohibited cabaret entertainment. Ironically, were it not for the restriction imposed by the special exception about which Plaintiff complained, the Diamond Club would be prohibited from offering topless dancing altogether by virtue of its location in a zone that does not allow cabaret entertainment.

As it happened, the Village chose not to enforce the restriction during the time that this action was pending. During that time, Plaintiff operated in violation of a valid restriction that it found to be financially onerous and made significant profits in the process. Although Plaintiff thereby achieved its goal of avoiding enforcement of the restriction for as long as possible, this outcome has not materially altered the parties' legal relationship. Accordingly, Plaintiffs application for attorneys' fees pursuant to 42 U.S. C. §1988 is denied.

SO ORDERED.

Dated. July 22, 1998
White Plains, New York

MARK D. FOX
UNITED STATES MAGISTRATE JUDGE